87-1313

No._____

IN THE

Supreme Court of the United States

October Term, 1987

THE DAYTON POWER AND LIGHT COMPANY,
Petitioner,

vs.

THE OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Where there is no nexus between racial comments of a supervisor to a black employee and the decision to terminate that employee for destruction of company property, can the comments form the basis for finding intent to discriminate on the basis of race?

2. Where there is no substantial, reliable or probative evidence of intent to discriminate, can the Ohio Civil Rights Commission's decision finding race discrimination be upheld?

II.

PARTIES BELOW

Petitioner The Dayton Power and Light Company is an Ohio Corporation that was Respondent before the Ohio Civil Rights Commission, Appellant before the Ohio Court of Common Pleas and Ohio Court of Appeals, and Appellee before the Ohio Supreme Court.

Respondents Ohio Civil Rights Commission and Samuel Prather were Appellees in the Ohio Court of Common Pleas and the Ohio Court of Appeals, and Appellants before the Ohio Supreme Court.

28.1 STATEMENT

The Dayton Power and Light Company is an Ohio Corporation, and is a subsidiary of DPL, Inc., also an Ohio Corporation.

TABLE OF CONTENTS

Appendix:

TABLE OF AUTHORITIES

CASES:

UNITED STATES CONSTITUTIONAL PROVISIONS:

STATUTES:

SECONDARY AUTHORITIES:

No._____

IN THE

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THE DAYTON POWER AND LIGHT COMPANY,
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To the Supreme Court of Ohio

CITATIONS TO OPINIONS BELOW

The citation to the decision of the Ohio Supreme Court is *The Dayton Power and Light Co. v. Ohio Civil Rights Comm.* (1987) 33 Ohio St. 3d 73, set forth in Appendix at p. A1. The decisions of the Court of Appeals, the Common Pleas Court and the Ohio Civil Rights Commission are unreported and are set forth in the Appendix, *infra*, at pages A5, A16 and A24 respectively.

JURISDICTIONAL STATEMENT

Petitioner, The Dayton Power and Light Company, prays that a Writ of Certiorari issue to review the judgment of the Ohio Supreme Court entered on November 10, 1987, which reversed the decision of the Ohio Court of Appeals, Second Appellate District, and reinstated the decisions of the Montgomery County Court of Common Pleas and the Order of the Ohio Civil Rights Commission. Petitioner's Motion for Rehearing was denied by the Ohio Supreme Court on December 16, 1987.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. *See* Appendix at p. A46.

Ohio Rev. Code Ann. §4112.02(A). *See* Appendix at p. A51.

STATEMENT OF THE CASE

This employment discrimination case was first heard by the Ohio Civil Rights Commission on July 18, 1984. The applicable standards of review for this action brought pursuant to Ohio Rev. Code Ann. §4112, *et seq.*, are the standards arising from case law interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission*, 66 Ohio St. 2d 192 (1981). In *Plumbers*, the Ohio Supreme Court expressly adopted federal law as the body of law governing employment discrimination actions. Federal question jurisdiction arises because of this express adoption of federal law. From the beginning of this case, the issue has been whether the Ohio Civil Rights Commission and later the Ohio Supreme Court have properly applied the standards enunciated by the United States Supreme Court.

Respondent Samuel Prather filed a charge of discrimination with the Ohio Civil Rights Commission alleging that Petitioner has discriminated against him by discharging him because he was black. After a hearing, the hearing officer recommended a finding of race discrimination. Appendix at p. A32. The hearing examiner found, in part, "In this case there was direct evidence of discriminatory intent by first line supervisors. This evidence consisted of biased statements made before and after complainant's discharge by Mason and a statement by Hackathorn that he had racist tendencies." *Id.* at p. A38. The Ohio Civil Rights Commission adopted this recommendation and issued a Final Order on March 12, 1985. Appendix at p. A29.

Petitioner filed a timely appeal to the Montgomery County Common Pleas Court and asserted that the Commission's decision was not supported by substantial,

reliable and probative evidence. However, the Montgomery County Common Pleas Court affirmed the Commission holding, in part, "Even if it is assumed that the Commission did not establish a different standard of treatment for blacks and similarly situated whites, the evidence of the discriminatory intent of the supervisors is enough to make out a case of disparate treatment. (Citations omitted)." Appendix at p. A23. Petitioner filed a timely appeal with the Montgomery County Court of Appeals, Second Appellate District, asserting that the comments could not form the basis of a finding of discriminatory intent without a nexus to the discharge decision, and asserting that the Commission's decision was not supported by the requisite evidence. The Court of Appeals agreed and held:

> Inferences reflect judicial and common sense evaluations of probabilities. For something to be probable it must at a minimum be more likely than not. There must also be a rational connection between the proven predicate fact and the fact inferred. It is simply not reasonable to infer discriminatory motive on the part of DP&L from proof of racist statements by relatively low level management under the facts of this case.

Appendix at p. A13. The Court also found that the decision of the Commission was not supported by substantial, reliable and probative evidence. The Respondents filed a petition for certiorari with the Ohio Supreme Court, which was granted. On November 10, 1987, the Ohio Supreme Court reversed and held that evidence of racist comments and evidence of disparate treatment supported the Commission's finding. Appendix at p. A2. Petitioner filed a Motion for Rehearing, which was denied on December 16, 1987.

STATEMENT OF THE FACTS

Samuel Prather was a black employee who was discharged for destroying company property by Robert Ralston, the manager of the Stuart Power Plant. During his twelve and one-half years with the company, Prather was promoted many times by white supervisors, including Mike Mason, who was accused of making racially derogatory comments to Prather. Mason, according to testimony received at the hearing, had made comments like "lazy black bastard" and "nigger"; comments which were denied by Mason. Another white supervisor, Bob Hackathorn, told Prather he was prejudiced but working on it.

Despite these alleged comments by Mason, Prather was fairly evaluated and promoted during his employment with the company until he deliberately cut a hose causing nineteen other workers to stand idle on double-time until the hose was repaired. The record established that on June 2, 1982, Prather received both good and satisfactory reviews by Mason, who also reported that "Prather continues to do well as acting crew foreman."

Prather was actually terminated by Robert Ralston, the manager of the plant. Prather testified that he had always had a good relationship with Ralston and would often go to Ralston to discuss problems other black employees had. Prather admitted that Ralston did not have anything against him because he was black. He also admitted that even though he had this open relationship with Ralston, and even though he claimed that racists comments were made to him by supervisors before the hose-cutting incident, he never reported any of these comments to Ralston because he "didn't think that much of them."

On Sunday, September 12, 1982, Prather and nineteen other employees were being paid double time to work on a maintenance crew on Unit 3. On that day, Prather was observed cutting a hose that was needed for the job. When asked if he had cut the hose Prather, at first, denied it. Prather continued to lie about the fact that he cut the hose until the arbitration hearing. Prather even lied to the Ohio Civil Rights Commission in his sworn affidavit. However, Prather finally admitted that the fact reported by his supervisor Mason and by another witness, Bob Hackathorn, was, in fact, true. He did cut the hose as observed and objectively reported by supervisor Mason and Bob Hackathorn. The reports submitted by Mason and Hackathorn were made pursuant to their duty as supervisors.

After Mr. Mason and Mr. Hackathorn observed Prather cutting the hose, Mr. Mason reported that true fact to his supervisor, Dale Marshall. The report submitted by Mason to Marshall read as follows:

> On Sunday morning, September 12, 1982, while Bob Hackathorn and myself were standing in the office area of the West Pod, we witnessed Sam Prather cutting a new hose in the Unit #3 Elec/Tech Shop. Sam Prather was then approached and made aware that he had been seen cutting the hose. He was instructed that further action would be taken.

This report was dated September 14, 1982.

On September 12, 1982, Robert Hackathorn reported the hose cutting incident to Dave Elkins. His report stated:

> On Sunday morning, while Dan Dudley was making up water hoses to be used at the precipitator for washing insulators, one of the hoses was punched full of holes. While Danny was getting the fittings for the new hose to replace the damaged

> one, I was in my office with Mike Mason. I observed Sam Prather moving the other new hose onto the bench in the shop. Upon closer observation, I saw Sam Prather using an object to cut the hose. I then asked Mike Mason to observe his action with me. Sam Prather had an object in his right hand that had the hose depressed as in cutting. Mike Mason and I observed Sam's right hand moving in a cutting fashion. We immediately approached Sam and told him we had observed his actions. We then examined the hose and found that it had been cut.

Based upon these reports Elkins recommended to Ralston that Prather be terminated. While there was absolutely no evidence submitted by the Commission that Elkins was a racist, there was some suggestion that Elkins and Prather had a personality conflict in the past. Whatever personality conflict that may have existed between Elkins and Prather was not proven to be related to race and did not effect Prather's ability to receive favorable reviews or promotions from Mason.

The handling of the Prather incident did not constitute disparate treatment. There was no evidence of disparate treatment presented by the Commission. There was a white employee, Danny Doyle, who came forward just before the Prather hearing before the Commission started and reported that at one time, quite some time before Prather's incident, he had also cut a hose. As soon as management was made aware of the perpetrator of this destruction of property, Doyle, like Prather, was placed on indefinite suspension and then fired. The evidence established that at the time of the Doyle incident there were no eyewitnesses that would come forward, and that when management followed up on the rumor that Doyle had cut the hose, Doyle denied it. Without such witnesses or an admission to verify this incident, management was unable to discipline.

Earlier in the day that Prather was observed cutting the hose, another still unknown employee also cut a hose. No evidence as to this employee's identity was ever given to the company. Mason reported to Elkins that he was not aware of the first hose cutting incident before the Prather incident. Hackathorn testified that he was sprayed with water from the first hose incident but knew no employee would admit cutting the hose unless observed.

While miscellaneous incidents of horseplay, not involving the destruction of property, were recounted by some employees at the hearing, the facts established that no employee, white or black, was disciplined for that sort of activity. In fact, Prather, who had an "open door" relationship with Ralston, never reported these incidents to Ralston. None of the incidents brought up at the hearing were reported to management. These incidents of horseplay were not reported to management for obvious reasons.

The evidence submitted to the Commission established that white employees had been fired for destruction of company property or injuring another employee. One employee, a white supervisor, pulled a chair out from under another employee and was fired. Another white employee who kicked a door and broke a glass was fired.

In Prather's case, because of his intentional act, nineteen employees on double time were left idle until the hose could be repaired. The seriousness of damaging company property was always stressed to the employees, because of the fact the company is a public utility under constant cost scrutiny. In fact, destruction of property constitutes a violation of the Employees Code of Conduct.

REASONS FOR GRANTING THE WRIT

I. Since discriminatory intent is required before a finding of discrimination can be made, there must be a nexus between racial comments made by a supervisor and the later discharge of the black employee for destruction of property.

The Supreme Court of Ohio has held that case law interpreting Title VII of the Civil Rights Act of 1964 is fully applicable to cases involving alleged violations of the Ohio Civil Rights Statute, §4112.01(A). *Plumbers and Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission*, 66 Ohio St. 2d 192, 20 Ohio Op. 3d 200, 202, 421 N.E.2d 128 (1981) (hereinafter cited as *Plumbers*, 421 N.E.2d at _____). In *Plumbers*, the Ohio Supreme Court held that "the starting point for judicial inquiry into complaints alleging disparate treatment on the basis of race is *McDonnell Douglas v. Green* (1973), 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 688." 421 N.E.2d at 131. Once a *prima facie* case has been established pursuant to *McDonnell Douglas*, the burden of going forward shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978). Once such a reason is articulated, the employer has no further burden. *Id.* The burden of proof then shifts back to the employee, or in this case, the Commission, to establish that the reason given by the employer is a pretext for discrimination. *Bd. of Trustees v. Sweeney*, 439 U.S. 24 (1978).

The fatal flaw in the Commission's case is the failure of the Commission to prove that the legitimate nondiscriminatory reason advanced by the company was a pretext for discrimination. *See Bd. of Trustees v. Sweeney*, 439 U.S. 24 (1978). At all times, the

Commission has the burden of proving that the employer had specific intent to discriminate against Prather. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 805, n.18 (1973) (Plaintiff must demonstrate by competent evidence that whatever the proffered reasons for his rejection, "the reason was *in reality* racially premised"). Furthermore, because of the specific intent requirement, the unlawful element must be more than a "discernible factor; it must be the motivating factor." *Burdine, supra* at 450; *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 273, 285 (1977); *Goostree v. State of Tenn*, 796 F.2d 854, 863 (6th Cir. 1986) ("The mere showing that 'sex was a factor' rather than a 'but for' factor is insufficient to establish liability under Title VII").

Essentially what has happened in this case is that intent was presumed solely from the fact that supervisors had made racist comments. The Ohio Supreme Court ignored the facts that the reports submitted by these supervisors were objective and true, that white employees were discharged for destroying company property, and that Prather had always been fairly treated by these allegedly racist supervisors in the past until he deliberately destroyed company property.

Although the law clearly requires a finding of discriminatory intent, varying results have occurred in cases where racial comments have occurred. In *Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1197 (1986), the Sixth Circuit Court of Appeals emphasized that there must be evidence that the management knew of the racial slurs and failed to act before liability could attach. In this case at bar, the evidence is undisputed that the management

of Petitioner had no notice or knowledge of any racial comments or hostile atmosphere and that Prather himself never reported any of the comments that he claims exhibited a discriminatory animus. Thus, unlike the facts in *Erebia* that established that the Plaintiff had complained about the comments to management and management failed to act, no such facts exist in this case.

In *Howard v. National Cash Register Co.*, 388 F. Supp. 603 (S.D. Ohio 1975) the Plaintiff filed a discrimination suit pursuant to 42 U.S.C. §2000(e) *et seq.* and 42 U.S.C. §1981. The facts of *Howard* include the fact that Plaintiff made 12 complaints to management about other employees who had made jokes about black people, references to a black person, not Plaintiff, as a "nigger" and other race related comments. The Court held that the totality of these remarks indicated "little more than 'locker room conversation and humor'." *Id.* at 605. There was no evidence that management failed to investigate the complaints or proceed in a less than diligent manner. *Id.* The corporation can not be held for the unauthorized acts of its workers and can not be required to "discharg[e] all Archie Bunkers in its employ." *Id.* at 606. *See also, Levine v. Navapache Hosp.*, 25 F.E.P. 1420 (D. Ariz., 1981) ("We have not yet reached the point where we have taken from individuals the right to be prejudice, so long as such prejudice does not evidence itself in discrimination.").

Respondents relied heavily on the Colorado district court case of *Weatherspoon v. Andrews Co.*, 32 F.E.P. 1226 (D.C. Colo. 1983). In *Weatherspoon*, the report by the racist supervisor lacked objectivity and truthfulness. This is the distinguishing fact. The supervisor in *Weatherspoon* recommended dismissal without valid

cause. *Id.* at 1227-28. Although the supervisor reported that Weatherspoon's work was marginally acceptable, that report was "contradicted by specific and credible testimony from third party witnesses who [had] no apparent motive to falsify." *Id.* Because of these facts, the defendant in *Weatherspoon* was unable to articulate a legitimate nondiscriminatory reason for the dismissal. *Id.*

In the case at bar, Petitioner proved its nondiscriminatory reason for Prather's dismissal. Prather intentionally cut the hose and has admitted that fact. The reports submitted by Mason and Hackathorn were not similar to the type of reports in *Weatherspoon.* Mason and Hackathorn's reports contained only objective facts. There were absolutely no references to Prather's character and no recommendations for discipline or discharge in the reports submitted by Mason and Hackathorn. *See also, Dehorney v. Bank of America,* 39 F.E.P. 723, 732 (9th Cir. 1985) (Racial animus was not found where supervisor's report was objective and lacked any racial overtones, and where the supervisor had little involvement in the decision to terminate).

The fact a report may contain a subjective recommendation in addition to the objective fact is also an insufficient fact from which to infer intent to discriminate because there was no "*substantial proof*" that the subjectivity was racially biased. *Brooks v. Carnation Pet Food Co.,* 38 F.E.P. 1663, 1665 (W. O. 1985). In *Brooks,* the Court held:

> While basing employment decisions on such hard-to-measure attributes as loyalty [i.e. 'being a team player'], working through the proper channels, and self aggrandizement necessarily injects subjective factors into personality matters, the Court *cannot*

> conclude that these reasons for adverse action in the present case were pretext for discrimination. The Court has carefully scrutinized the evidence for signs of racial animus but finds instead that personality conflicts [were the reasons for the negative remarks]. . . . *Id.*

The Commission also relied upon the decision of *Mitchell v. Keith*, 752 F.2d 385 (9th Cir. 1985) in an attempt to support *Weatherspoon*. However, *Mitchell*, like *Weatherspoon*, is inapplicable on its facts. In *Mitchell*, the employer failed to articulate a legitimate nondiscriminatory reason for Mitchell's discharge. In fact, the racist supervisor tricked the plaintiff into breaking the rules and then reported him. *Id.* at 388. The supervisor told the plaintiff that he could leave early and to just mark his time cards for the full shift. *Id.* The plaintiff did so, and the supervisor reported him for falsifying records. *Id.*

Title VII cases are fact sensitive. The Commission's reliance of these cases with clearly distinguishable facts was misplaced. In *Mitchell*, just as in *Weatherspoon*, the report submitted by the racist supervisor was simply false. That is not the case here. The objective reports submitted by Mason and Hackathorn were *true*.

The decision of *Montgomery v. Campbell Soup Co.*, 647 F. Supp. 1372, 42 F.E.P. 721 (N.D. Ill. 1986), is likewise inapplicable for the proposition the Commission advances. In *Campbell*, the court held that a plaintiff, who attempted to prove that a supervisor's racial comment was evidence of discriminatory motive, failed to create a genuine issue of fact as to the reason for its termination. *Id.* at 1381, 727. In fact, the Courts main reason for granting the employer summary judgment was that the plaintiff never thought anything of the alleged racial remarks. *Id.* at 1380, 726. Therefore,

Montgomery essentially reaches a conclusion that is directly opposite from the Commission's argument: the fact that a supervisor made a racist comment does not automatically suggest that his report was racially motivated, or that the final termination decision was marred with discrimination intent; especially when the employee thought little of the allegedly racist comments. *Id.*

As illustrated by reliance upon *Weatherspoon*, *Mitchell*, and *Montgomery*, the Commission pushed for and the Ohio Courts essentially adopted a strict liability argument. That is, if racial epithets are uttered by reporting, non-recommending supervisory personnel, then those remarks automatically imply that the employer, who was not biased, terminated the employee with discriminatory intent. If this is true, the Commission would be relieved of establishing a nexus between the alleged racial animus (the remarks by Mason and Hackathorn) and the adverse employment act (the dismissal); legitimacy of the nondiscriminatory reason would be irrelevant. On the whole, all the facts except the comments would be irrelevant.

The Commission also relied upon the concurring opinion in *Meritor Savings Bank v. Vinson*, _____ U.S. _____, 106 S. Ct. 2399 (1986). Confronted with a hostile work environment/sexual harassment case, the majority opinion in *Meritor* rejected the use of a strict liability standard in hostile environment cases. *Id.*[1] The Commission's citation to the concurring opinion for the opposite proposition obviously is an effort to ignore the actual holding of the majority of the Court.

1. By holding that employers are not automatically liable for sexual harassment, *Meritor* overrules *Jeppsen v. Winnicke*, 629 F. Supp. 740 (D. Ala. 1985) another case offered by the Commission to support their strict liability argument.

The Commission also relied upon *Schroeder v. Schock*, 42 F.E.P. 1112 (D.C. Kan. 1986), to support its strict liability argument. However, although *Schroeder* was a termination discrimination case, it is distinguishable from the case at bar because it was treated as a *quid pro quo* sexual harassment case. *Id.* at 114. (In a *quid pro quo* sexual harassment case, the supervisor relies on his authority to gain sexual consideration from the employee.) Note, *Employment Discrimination-Defining an Employer's Liability Under Title VII for On-the-Job Sexual Harassment: Adoption of a Bifurcated Standard*, 62 N.C. L. Rev. 795 (1984). Such holdings have not been applied to cases with facts similar to the present case.

Under Title VII, the proper interpretation of the law is that an employer "may be held liable for the discriminatory actions of its supervisors which affect the tangible job benefits of an employee on the basis of race." *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982). However, this operation of the doctrine of *respondeate superior* should not dissuade the court from requiring the Title VII plaintiff to prove his case, particularly where the employer had nondiscriminatory reasons for pursuing the course it did. Thus, Plaintiff still has to show that the reasons advanced by the defendant were pretext in light of the entire record. To establish pretext, the Commission must show that the evidence of racial bias—the racial epithets were the motivating factors in the employment decision to terminate the employee—Prather. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Dehorney v. Bank of America*, 39 F.E.P. 723 (1985); *Goostree v. State of Tenn.*, 796 F.2d 854, 863 (6th Cir. 1986). *See also, The Standard of Causation in the Mixed-Motive Title VII Action: A Social Perspective*, 82

Colum. L. Rev. 292 (1982). The reason behind this causation requirement is the fact that the plaintiff must ultimately prove *intent* to discriminate in a Title VII action. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

In the present case, since the Ohio Supreme Court adopted federal law, it was incumbent upon the Ohio Supreme Court to find a close nexus between the racial epithets uttered by Mason and Hackathorn and the decision to terminate Prather in order to find that the Commission met its burden of proof. *See Dehorney, supra*, at 724. In assessing whether the comments provided the sufficient nexus or were a determining factor, the courts have looked to many factors: In *Meiri v. Dacon*, 759 F.2d 989, 997 (2nd Cir. 1985), the Court recognized that "the reasonableness of the employer's reasons for discharge is, of course, probative of the question whether they are pretexts." *Id.* at 997, n.13. In *Mitchell, supra*, the Court focused on whether the report made by the wrongdoer was truthful.

Moreover, "evidence of bias by one officer of an employer is not evidence that the same bias motivated a decision by a different, higher ranking officer." *Arna v. Northwestern University*, 640 F. Supp. 923 (N.D. Ill. 1986). The courts have also considered whether the same decision would have been reached absent the discriminatory conduct. *See Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 273 (1977); *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985). The racist supervisor's involvement in the termination decision has also been considered. *Dehorney, supra; Arna, supra.* In addition, it has been well settled that mere utterances of a racial comment does not trigger a Title VII violation. *Torres v. County of Oakland*, 758 F.2d 147 (6th Cir. 1985) ("While continuing use of racial or ethnic slurs would

violate Title VII, occasional or sporadic instances of such conduct would not). *cf. Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971) (Hostile environment case).

Petitioner submits that an application of all of these factors to this case establishes that the Commission failed to meet its burden of proving discriminatory intent. The reasonableness of the reason given for Prather's discharge cannot be disputed and has never been disputed by the Commission. Destruction of company property is a common ground for discharge and becomes a more egregious offense in the case of a utility company which must constantly be cost conscious so it can provide essential services at the lowest cost.

Mason and Hackathorn submitted a factually accurate objective report with absolutely no subjective comments, recommendations, or racial slurs. They did not decide to terminate Prather; rather that decision was made by Ralston, who had no discriminatory animus or knowledge of Mason and Hackathorn's comments. The report by Elkins to Ralston recommending the discharge was objectively based in fact. The subjective portions of that report were not proven to be racially motivated in any way by the Commission.

Although the law is clear that discriminatory intent is required, in the situation where racist comments are made by low level supervisors, the law should be clear that those comments alone are not sufficient without proof by the employee that there is a nexus or causal relationship between the comments and the decision to terminate.

II. Where a state adopted federal law as it relates to employment discrimination, in the absence of direct evidence of discrimination, the state must establish by substantial, reliable and probative evidence that disparate treatment actually occurred.

The standards enunciated previously required the Ohio Courts to determine whether the Commission had substantial, reliable and probative evidence to support its findings of disparate treatment pursuant to federal law. *See Plumbers, supra.*

There was no evidence of disparate treatment in this case. The entire record reflects the fact that no employee, *white* or *black*, was disciplined for horseplay. The facts in the record do establish that two white employees were discharged for destruction of property and injuring another employee. Thus, the facts before the Commission were that one white supervisor was discharged for pulling a chair out from under another employee, one white employee was discharged for kicking a door and breaking a glass, and one black employee, Prather, was discharged for cutting a hose. The cut hose caused the plant to be shut down, with nineteen employees on double time.

In these three cases, discipline was ordered as soon as the event occurred and the wrongdoer was known. The company can not discipline employees for wrongdoing never reported. As the employees admitted during the hearing, they never reported any of the incidents they recounted at the hearing to the management. The reason the incidents were never reported is obvious. These employees, white or black alike, did not want to be disciplined. There was no evidence submitted that the employer avoided acquiring knowledge of horseplay incidents.

The Commission argued that the Doyle incident is evidence of disparate treatment. This argument was not even included in the Commission's findings of fact and was correctly rejected by the Court of Appeals.

No employee, white or black, witnessed Doyle cut the hose. No employee, white or black, reported Doyle. Doyle himself denied the act. The company could not discipline anyone without any proof as to who cut the hose. Doyle only came forward in a last ditch effort to help Prather. After he admitted he cut the hose, he was fired. Arbitration required the reinstatement.

In order to prevail, the Commission was required to prove that the employer intended to discriminate against Prather. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981). Without substantial, reliable proof that the Company treated white employees differently than black employees, the Commission failed to establish that the Company intended to discriminate against Prather.

The Court found that disparate treatment existed even though the facts established that the employer did not have knowledge of the alleged acts of wrongdoing. The Commission asserted that even though the Company did not know about the incidents, it was nonetheless guilty of discrimination because it did not discipline. The fallacy in that argument is clear. Without knowledge of the wrongful act there can be no discipline. There was no evidence that the employer avoided acquiring knowledge. In fact, the facts established that the company discharged two white employees and Prather.

Moreover, the focus of the disparate treatment theory is that evidence of disparate treatment raises an inference of an employer's intent to discriminate. *Id.* The

focus is upon what actions were *knowingly* taken by the employer. *Id.* Fundamental to this focus is a requirement that the employer have knowledge of the wrongful acts and then either fails to act or acts in a discriminatory manner. Without knowledge of the wrongful acts, the employer's inaction or action can not be the basis for the discriminatory inference. It is logical and fair to evaluate the employer's actions after determining if the employer had knowledge of the wrongful acts. To do otherwise would be equal to adopting a strict liability theory that would render an employer liable for its inaction against wrongful acts by its employees without regard for whether the employer knew of these wrongful acts.

There were no evidentiary conflicts involved as to this issue. There was simply no substantial credible evidence that established disparate treatment. The Commission did not follow the law. The facts established that two white employees and Prather were discharged for similar acts, that no employees, white or black, were disciplined for horseplay, and that Doyle was disciplined as soon as the company found out he also cut a hose. There was no evidence that the legitimate nondiscriminatory reason for Prather's discharge, *i.e.*, destruction of company property, was, in any way, a pretext for race discrimination.

CONCLUSION

Strict liability can not be used in cases where low-level supervisors make racist comments to an employee, who is subsequently discharged. Such a holding would discard the requirement of discriminatory intent. There must be proof that the comments caused the decision to terminate the employee.

The facts supporting a discrimination finding must be facts that are supported by substantial, reliable, and probative evidence and must be in accord with federal law since that body of law was adopted by the state. Evidence that horseplay occurred but was never reported to the employer, without evidence that the employee avoiding finding out the facts, cannot be used against the employer. Obviously, the employer can not dicipline for acts of which it has no knowledge.

Moreover, no disparate treatment can be found if no employee, white or black, was discharged for horseplay. This must be especially true when the evidence established that two white employees and Prather were discharged for destruction of property. Unreported, undisciplined incidences of horseplay by white and black employees can not be a basis for a finding of disparate treatment.

Respectfully submitted,

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APPENDIX

DECISION OF OHIO SUPREME COURT

(Decided November 10, 1987)

No. 87-26

THE SUPREME COURT OF OHIO

COLUMBUS

DAYTON POWER & LIGHT COMPANY,
Appellee,

v.

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants.

[33 Ohio St. 3d 73]

Civil Rights Commission—Appeal in court—Order upheld, when—Findings of commission supported by reliable, probative, and substantial evidence on the record—R.C. 4112.06(E).

APPEAL from the Court of Appeals
for Montgomery County.

Appellant, Samuel R. Prather ("Prather"), was employed by the Dayton Power & Light Company ("appellee"). Prather commenced working for appellee on March 19, 1970. During his course of service with appellee, Prather was promoted until he reached the highest position in his rank, First Class Technician. The

only discipline received by Prather during his over twelve years of service with appellee was a one-day suspension. Prather is black.

All of the persons with whom Prather worked, including his immediate supervisor, his foreman, the unit manager and the station manager are all white. A group of these employees, including Prather, were, on Sunday, September 12, 1982, engaged in "horseplay" which resulted in the damaging of property of appellee. Prather was directly involved in and responsible for some of the damage that occurred. For causing damage, Prather was discharged effective September 13, 1982.

On February 28, 1983, Prather filed a charge with appellant Ohio Civil Rights Commission ("commission") alleging that appellee had committed an act of discrimination. Prather contended he was discharged because of his race. After an investigation and hearing, the commission concluded that reliable, probative, and substantial evidence supported the charge. Appellee was found to have unlawfully discharged Prather because of his race.

Appellee appealed the commission's order to the Court of Common Pleas of Montgomery County. The trial court affirmed the commission's determination, finding that it was supported by reliable, probative and substantial evidence of record. Upon appeal, the court of appeals reversed the order of the trial court on the basis that there was no reliable, probative and substantial evidence in the record to support a finding that appellee had intentionally discriminated against Prather. Both Prather and the commission appealed to this court.

The cause is now before this court upon the allowance of a motion to certify the record.

Freund, Freeze & Arnold, Neil F. Freund and *Jane M. Lynch*, for appellee.

Anthony J. Celebrezze, Jr., attorney general, and *Jeffrey B. Rubenstein*, for appellant Ohio Civil Rights Commission.

Kenneth W. Scott and *Edward S. Monohan*, for appellant Prather.

Per Curiam, R.C. 4112.06(E) provides that "[t]he findings of the commission as to the facts shall be conclusive if supported by reliable, probative, and substantial evidence on the record ***." See, also, *Plumbers & Steamfitters Commt. v. Ohio Civil Rights Comm.* (1981), 66 Ohio St. 2d 192, 20 O.O. 3d 200, 421 N.E. 2d 128, paragraph two of the syllabus. Where such evidence exists, it is improper for a court to substitute its judgment for that of the administrative agency.

This court has conducted a thorough review of the record. We find that a number of like incidents of horseplay as that involved in this case, including damage of company property, had previously occurred. All of the participants in those activities were white and none had ever been discharged for participating in the events. Some of the incidents were far more serious than that with which Prather was charged.

Evidence was also presented that some of those persons, all white, who were involved in the supervisory and termination "chain of command" of Prather, had previously admitted, in some cases, that they were racists and, by uncontroverted testimony, were shown to have exhibited racist behavior. It would serve no purpose here to relate all the particulars of those incidents, including behavior and language directed toward Prather that are contained in this record.

Suffice it to say that it is the judgment of this court that the record does, in fact, contain reliable, probative, and substantial evidence supporting the findings and orders of the commission and the trial court. Accordingly, the judgment of the court of appeals is reversed and the orders of the commission and the court of common pleas are reinstated.

Judgment reversed.

MOYER, *C.J.*, SWEENEY, LOCHER, HOLMES, DOUGLAS, WRIGHT and H. BROWN, *JJ.*, concur.

LOCHER, *J.*, concurring. I concur completely with today's decision. I write separately to add an observation of my own.

As I have stated before, utility companies are quasi-public corporations and possess the characteristics of monopolies. The public interest increases with a monopoly for, as such, its actions are not regulated by the strictures of the marketplace. *Central State University v. Pub. Util. Comm.* (1977), 50 Ohio St. 2d 175, 179-180, 4 O.O. 3d 373, 375, 364 N.E. 2d 6, 9 (Locher, *J.*, dissenting). This is a point I have often stressed in rate cases before this court. I also believe it is a salient point to be made in considering cases such as the one at bar.

As quasi-public corporations, utility companies should be at the forefront in maintaining non-discriminatory policies and fostering equal opportunity in the workplace. The facts of this case revealing such discrimination and needless childish actions are, in a word, appalling.

OPINION AND FINAL ENTRY OF THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

(Dated November 6, 1986)

Case No. CA 9835

IN THE
COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

THE DAYTON POWER AND
LIGHT COMPANY,
Plaintiff-Appellant,

vs.

THE OHIO CIVIL RIGHTS
COMMISSION, *ET AL.*,
Defendant-Appellee.

OPINION

NEIL F. FREUND, P. O. Box 670, Dayton, Ohio 45402
Attorney for Plaintiff-Appellant

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KENNETH W. SCOTT, 7711 Tanners Lane, Florence, Kentucky 41042

EDWARD S. MONOHAN, P. O. Box 66, Florence, Kentucky 41042
Attorneys for Defendant-Appellee

WILSON, *J.*

Samuel Prather was a black employee at DP&L's Stuart generating station for more than 12 years prior to his termination effective September 13, 1982. He was discharged for destroying company property by Robert Ralston, the station manager.

On February 29, 1983, Mr. Prather filed a verified complaint with the Ohio Civil Rights Commission wherein he stated in part as follows:

"I believe that I was discriminated against because of my race, Black, for the following reasons:

> A. On Sept. 12, 1982, I was allegedly observed and accused by Michael Mason (Caucasian), a Technician Foreman and Robert Hackathorn (Caucasian), a Electrician Foreman, of damaging company property. Although I was engaged in horseplay I did not damage company property."

At the time of this incident Mason was the crew foreman for Prather and seven other employees, and Hackathorn had recently been appointed crew foreman for another crew.

Ultimately the complaint was heard on July 18, 1984 before a hearing examiner who made conclusions of law and the following findings of fact which were adopted by the Ohio Civil Rights Commission on March 12, 1985.

> 1. Samuel Prather filed a sworn charged affidavit with the Commission on February 28, 1983.
>
> 2. The Commission determined on October 21, 1983 that it was probable that unlawful discriminatory practices had been engaged in by Respondent in violation of Revised Code Section 4112.02(A).

3. The Commission attempted to eliminate the alleged unlawful discriminatory practices by conciliation. The Commission issued its complaint after conciliation failed.

4. Respondent is a corporation doing business in Ohio and an employer. Complainant is a black person.

5. Complainant was employed by Respondent at its Stuart Generating Station in Adams County from March 19, 1970 to September 13, 1982. Complainant was classified as a Technician A. Complainant worked with a crew of seven other technicians, all of whom were white. Complainant's job performance was satisfactory. His formal disciplinary record up to September 12, 1982 consisted of a one day suspension.

6. Complainant's immediate supervisor was Mike Mason, a Caucasian. Bob Hackathorn, Caucasian, also had supervisory authority over Complainant. They reported to David Elkins, Caucasian, the manager of unit three, the unit to which Complainant was assigned. Elkins reported to the manager of Stuart Station, Bob Ralston, Caucasian.

7. Complainant was working as a member of a maintenance crew on Sunday, September 12, 1982. One of the units was down for a periodic cleaning and this was done on overtime pay, as was the custom. Complainant entered the shop area in order to pick up some materials to complete a job and observed that the employees were standing around, relaxed, idly talking and laughing.

8. Complainant learned that someone had punched some small holes in a water hose and plugged up one end. When foreman Hackathorn and another bargaining unit employee tried to pressure test the hose they were sprayed with water. A new hose was being prepared as Complainant entered the

shop area. Someone passed Complainant a knife and told him to cut some holes in the other hose. Complainant cut some holes in the second hose. Hackathorn, who was in the office, thought he saw Complainant cutting the hose. He pointed this out to Mason. Mason confronted Complainant who denied he had cut the hose. Both Mason and Hackathorn examined the hose and found that it had been cut.

9. Pranks and horseplay involving water were common in Stuart Station. Pranks that involved the minor destruction of company property were also common. For example, gluing or welding lockers shut. Foreman Mason was aware of these pranks. Prior to September 12, 1982, he had not written up any employees for destruction of company property or horseplay. Horseplay and destruction of company property are violations of company policy.

10. Hackathorn and Mason reported the Prather incident to the manager of unit three on September 12, 1982. The manager of unit three reported it to the manager of Stuart Station. The station manager asked Elkins to investigate both incidents. Elkins secured statements from foreman Mason on September 14 about the Prather incident. On September 15 he secured another written statement from Mason where Mason stated he was not aware of the first hose cutting incident prior to the time he observed Complainant cutting the hose. Elkins also reported that he talked to others who were in the shop area at the time and all denied seeing Complainant do anything.

11. Elkins recommended that Complainant be discharged. He stated that Complainant's actions were the result of a "basic flaw in character". He stated "Mr. Prather does not see the right or wrong of damaging company property; be it in the act of horseplay or otherwise". Elkins reasoned that any

lesser discipline would not cure Complainant's basic character flaw" and therefore he saw termination as the only option.

12. Ralston reviewed the written documents submitted by Elkins along with his recommendation. Ralston accepted Elkins recommendation that Complainant be discharged and Complainant was discharged, effective September 13, 1982.

13. Foreman Mason made frequent racially derogatory remarks about Complainant. These included calling him a "black bastard" and a "nigger". On one occasion Mason told Complainant that he would like to "march his fat black ass to the gate". After Complainant was discharged Mason stated "we finally got rid of that lazy, fucking nigger".

14. Foreman Hackathorn was a self-admitted racist. He had stated that he was prejudiced but was working on it. When Complainant and Hackathorn were working together Hackathorn had told Complainant that he had had problems with blacks.

15. Complainant was subjected to harsher discipline because of his race.

The commission also concluded as a matter of law that:

> The Commission proved by reliable, probative and substantial evidence that Respondents had discriminated against Complainant, because of his race in violation of Revised Code Section 4112.

The Commission then ordered DP&L to cease and desist from violating Ohio's laws against discrimination. It also ordered DP&L to offer Samuel Prather his former job with back pay. On March 30, 1985, DP&L appealed the Commission's order to the Common Pleas Court of Montgomery County, Ohio.

On September 18, 1985 DP&L moved the court pursuant to R.C. 4112.06(D) to consider the proffered deposition of Samuel Prather taken on August 23, 1985 as additional evidence. This section provides that "the court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence been ascertained prior to the hearing before the Commission."

On February 27, 1986, the trial court affirmed the decision of the Commission and overruled appellant's motion to consider additional evidence. DP&L has again appealed. There are two assignments of error.

> PLAINTIFF-APPELLANTS FIRST ASSIGNMENT OF ERROR: THE COMMISSION'S FINDINGS WERE NOT SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE GIVEN THAT THERE WAS NO CREDIBLE EVIDENCE OF DISPARATE TREATMENT.
>
> PLAINTIFF-APPELLANT'S SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT'S DECISION NOT TO ALLOW SUBMISSION OF THE DEPOSITION OF THE DISCHARGED EMPLOYEE AS NEW EVIDENCE WAS PREJUDICIAL ERROR.

In affirming the Civil Right's Commission the trial court considered no evidence outside the record. The issue before us in appellant's second assignment of error is whether the trial court abused its discretion in failing to consider Samuel Prather's deposition.

The trial court has broad discretion in the admission and exclusion of evidence. *State v. Hymore* (1967), 9 Ohio St. 2d 122. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that

the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St. 2d 151. We see no abuse of discretion here. The second assignment of error is overruled.

The Commission is required to state its findings of fact and conclusions of law "if upon all reliable, probative, and substantial evidence the Commission determines that the respondent has engaged in, *** any discriminatory practices." R. C. 4112.05(G).

The Commission sits initially as the trier of fact. It's findings "as to the facts shall be conclusive if supported by reliable, probative and substantial evidence on the record." R.C. 4112.06(E).

The scope of review before the Common Pleas Court is the same as in R.C. 119.12 Administrative Appeals, because the evidentiary standards of "reliable, probative, and substantial evidence" are the same. *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission* (1981), 66 Ohio St. 2d 192. "When a Court of Common Pleas reviews an administrative order it serves a hybrid function. The court must determine as a matter of law whether the administrative decision is supported by reliable, probative, and substantial evidence. To make this determination, however, the court must consider the evidence." The opinion in the *Plumbers* case then quotes from *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108 "where it appears that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order."

The *Conrad* case also held that the issue before the Common Pleas Court "essentially is a question of the absence or presence of the requisite quantum of evidence. Although this in essence is a legal question, inevitably it

involves a consideration of the evidence, and to a limited extent would permit a substitution of judgment by the reviewing Common Pleas Court."

The ultimate issue before us is whether the implicit finding of a "discriminating practice" by the Common Pleas Court was supported by reliable, probative and substantial evidence as a matter of law.

The court in the *Plumbers* case held that reliable, probative and substantial evidence in Chapter 4112 employment discrimination cases "means evidence sufficient to support a finding of discrimination under Title VII."

A flexible formula to ferret out discrimination in Title VII hiring and firing disparate treatment cases was adopted in *McDonnell Douglas v. Green* (1973), 411 U.S. 792.

The *McDonnell* formula places the initial burden on the discriminatee to prove a prima facie case of employer racial discrimination. A prima facie showing of discrimination is merely proof of action taken by an employer from which discriminating animus may be inferred. *Furnco Construction Corporation v. Waters* (1978), 438 U.S. 567.

The burden then shifts to the employer to rebut the presumption by evidence of a legitimate nondiscriminatory reason for the discharge.

The burden then shifts back to the employee to show that the given reason was a pretext for discrimination. This burden merges with the ultimate burden of persuasion which the employee has to show that he has been a victim of intentional discrimination. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248.

In "disparate treatment" cases the employer simply treats some people less favorably than others for reasons of race. "*Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment*". *Teamsters v. U.S.* (1977), 431 U.S. 324.

We agree with the Common Pleas Court that the Commission established a prima facie case under *McDonnell's* flexible formula and that DP&L rebutted the presumption by giving a legitimate reason for Prather's discharge.

There is no direct evidence in this case that either DP&L engaged in any discriminatory practice or that Robert Ralston, the senior supervisor who fired Mr. Prather, was motivated by racial animus. In fact Prather testified that Ralston was not prejudiced.

The two racist crew foreman who saw the hose cut by Prather merely reported what Mr. Prather ultimately admitted to be true. The Common Pleas Court found that the "evidence of racial bias in more immediate supervisors is sufficient to support a finding of racial discrimination against the employer." We disagree.

Inferences reflect judicial and common sense evaluations of probabilities. For something to be probable it must at a minimum be more likely than not. There must also be a rational connection between the proven predicate fact and the fact inferred. It is simply not reasonable to infer discriminatory motive on the part of DP&L from proof of facist statements by relatively low level management employees under the facts of this case.

There was evidence of two other hose cutting incidents presented to the hearing examiner. One incident occurred on the same day and immediately prior to the Prather incident. There was no evidence that management was aware of the person who cut the hose until just immediately prior to the hearing before the examiner. At the time of the hearing the person accused of this incident testified that he was placed on indefinite suspension on the previous Friday.

There was conflicting evidence concerning management's knowledge of the person who was involved in the first hose cutting incident in April 1982. Mr. Prather testified by way of hearsay that the person involved was white and was known to his foreman at the time of the incident.

There was evidence that employees had not been terminated or discharged for horseplay. There was also evidence that a white management employee had been terminated for pulling a chair out from another employee. It was stipulated that another white employee had been terminated for destruction of company property of a value of less than $50.00 and then allowed to resign.

In our view the reliable, probative and substantial evidence in this case fails to support an inference of discriminatory motive or intentional discrimination on the part of DP&L.

We reverse.

BROGAN, *P.J.*, and KERNS, *J.*, concur.

Case No. CA 9835

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

THE DAYTON POWER AND LIGHT COMPANY,
Plaintiff-Appellant,

vs.

THE OHIO CIVIL RIGHTS COMMISSION, *ET AL.*,
Defendant-Appellee.

FINAL ENTRY

Pursuant to the opinion rendered by this court on the 6th day of November, 1986, the judgment of the trial court is reversed.

/s/ JAMES A. BROGAN
Presiding Judge

/s/ JOSEPH D. KERNS
Judge

/s/ RICHARD K. WILSON
Judge

DECISION AND ORDER OF THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

Case No. 85-829

IN THE COMMON PLEAS COURT OF
MONTGOMERY, COUNTY, OHIO

(Judge Richard S. Dodge)

THE DAYTON POWER AND LIGHT COMPANY,
Plaintiff-Petitioner,

vs.

THE OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Defendants-Respondents.

DECISION AND ORDER

This matter is before the Court on Plaintiff-Petitioner Dayton Power and Light Company's (DP&L) Petition for Judicial Review of the Ohio Civil Rights Commission's (Commission) Order of March 12, 1985, pursuant to Section 4112.06, Ohio Revised Code. Plaintiff-Petitioner has filed a brief in support of its argument for reversal of the Commission's order. Defendant-Respondent Commission has also filed a brief in support of its decision and Plaintiff replied to the Commission's brief.

(1)

On February 28, 1983, Mr. Samual Prather filed a charge affidavit with the Commission. On October 21, 1983, after an investigation, the Commission found probable cause that unlawful discriminatory practices were being engaged in by Plaintiff-Petitioner in violation of Section 4112.01(A), Ohio Revised Code. The Commission was unsuccessful in its conciliation efforts and on March 13, 1984, the Commission issued a complaint alleging that Plaintiff-Petitioner discharged Mr. Prather for reasons not applied equally to all persons without regard to race.

A hearing was held on July 18, 1984. On December 13, 1984, the Hearing Examiner issued his findings of fact, conclusions of law and recommendations. The Hearing Examiner found that while Mr. Prather admittedly destroyed company property, *i.e.*, cut a hole in a rubber hose, he "was subjected to harsher discipline because of his race." He recommended that Plaintiff-Petitioner offer Mr. Prather a job as Technician A (his old position) and pay Mr. Prather the amount of wages he would have earned from September 12, 1982 until the offer of employment.

On March 12, 1985, the Commission issued its decision adopting the Hearing Examiner's Report, concluding that the Commission proved by reliable, probative and substantial evidence that Plaintiff-Petitioner discriminated against Mr. Prather because of his race in violation of Section 4112, Ohio Revised Code.

(2)

In *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission*, 66 Ohio St.2d 192, 20 Ohio Op.3d 200 (1981), the Court

considered the scope of review available in the Court of Common Pleas pursuant to a Section 4112.06 appeal 20 Ohio Op.3d at 205. The Court found that the same standard should apply to Section 4112.06 appeals as applies to Section 119.1 administrative appeals because the evidentiary standards are the same. *Id.*

Thus, in a Section 4112.06 appeal, the Court must consider the evidence and determine if the Commission's decision is supported by reliable, probative and substantial evidence. *Id.* In addition, the Court must defer to the Commission's "resolution of evidentiary conflicts." *Id.* (quoting *University of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 17 Ohio Op.3d 65, 67 (1980)). The Ohio Supreme Court also stated that reliable, probative and substantial evidence in Chapter 4112 employment discrimination cases "means evidence sufficient to support a finding of discrimination under Title VII." *Plumbers*, 20 Ohio Op.3d at 203.

This case presents the issue of disparate treatment on the basis of race. In *McDonnell Douglas v. Green*, 411 U.S. 792, 36 L.Ed.2d 668 (1973), the Supreme Court established a flexible standard for establishing a prima facie case of discrimination. 36 L.Ed.2d at 677-78 n. 13. In the case at bar, to make out a prima facie case of racial discrimination, the Commission needed to show the following: (1) Mr. Prather was a member of a racial minority; (2) he was qualified to continue in his job as Technician A; (3) he was fulfilling the requirements of his job; (4) he was discharged; and (5) non-minority DP& L employees who participated in horseplay and similar acts of destroying company property were treated differently. See *Hughes v. Chesapeake and Potomac Telephone Company*, 583 F. Supp. 66, 69 (D.D.C. 1983).

If the Commission established its prima facie case, then DP&L had to show a legitimate nondiscriminatory reason for its discharge of Mr. Prather to rebut the prima facie case. *Plumbers*, 20 Ohio Op.3d at 203; *Hughes*, 583 F. Supp. at 69. Finally, if DP&L rebutted the prima facie case, the Commission would need to show that DP&L's reason for discharge was merely a pretext for discrimination "either by direct evidence that racial animus motivated the discharge or by discrediting the employer's rebuttal evidence." *Plumbers*, 20 Ohio Op.3d at 203; see, also, *McDonnell*, 36 L.Ed.2d at 679; *Texas Department of Community Affairs v. Burdin*, 450 U.S. 248, 67 L.Ed.2d 207, 217 (1981).

DP&L contends that the Commission's findings are not supported by reliable, probative and substantial evidence. DP&L argues that the Commission did not even establish a prima facie case. However, DP&L's argument fails to take into account the flexible nature of the *McDonnell* standard. 36 L.Ed.2d at 677-78 n. 13.

The standard DP&L advocates does not fit the present situation. There is no reason the Commission should have to prove that after Mr. Prather's discharge, DP&L assigned a white employee to his job. Evidence tending to show that white employees were not discharged or not disciplined for horseplay or minor destruction of company property, such as cutting a rubber hose, is much more relevant to the ultimate issue of DP&L's discriminatory intent. See *Hughes* 583 F. Supp. at 69; *Commission Brief, filed June 26, 1985*, at 10. Thus, the Court adopts the standard enunciated above.

(3)

DP&L does not dispute that Mr. Prather was black, was qualified for his job and was discharged. However, DP&L maintains that Mr. Prather was not meeting the normal requirements of his job and that no white employee was assigned to his job. *DP&L's Brief, filed June 6, 1985,* at 12. As discussed above, the latter fact is irrelevant to his case. DP&L reasons that Mr. Prather was not fulfilling his job requirements because he cut the rubber hose. However, as the *Hughes* court stated, this prong of the prima facie case requires a showing of satisfactory performance. 583 F. Supp. at 70. To focus on the alleged misconduct would vitiate the last prong of the standard. Mr. Prather's satisfactory performance at his job is shown by a progress report prepared by his immediate supervisor in early June, 1982, in which his performance was rated satisfactory. *Respondent Exhibit A.* Thus, the fourth prong of a prima facie case was established by the Commission.

Regarding the fifth prong, the Commission offered evidence of many incidents of horseplay involving Caucasians where no one was disciplined. Tr. at 12, 17-20, 67, 71-72, 79, 111, 140-41. Furthermore, there was evidence of two earlier hose-cutting incidents in which no one was disciplined. One of these incidents occurred just prior to Mr. Prather's hose-cutting. Tr. at 112. The other incident occurred a few months before and involved a white employee. Tr. at 21-22, 116. DP&L attempts to distinguish all of these previous incidents on the basis that there were no eyewitnesses but the Court concludes that the Commission offered enough evidence for it to be inferred that white employees were not disciplined or discharged by DP&L for similar acts for which Mr.

Prather was discharged. Thus, the Commission established the fifth prong of the standard to make a prima facie case of racial discrimination.

DP&L contended that Mr. Prather was discharged because he destroyed company property. Mr. Prather admitted cutting the rubber hose, Tr. at 12, and DP&L offered evidence showing that this was the reason he was discharged. *Commission Exhibits 4, 5;* Tr. at 134. This was sufficient to rebut the Commission's prima facie case.

The Commission maintained that DP&L's asserted reason for discharge was a pretext and the Court finds that the record supports this determination.

DP&L attempted to distinguish the hose-cutting incident involving Mr. Doyle, a white employee, on the basis that Mr. Doyle's supervisor did not see him cut the hose. *DP&L's Reply Brief, filed July 24, 1985,* at 3. It is true that the supervisor testified that he did not see Mr. Doyle cut the hose but he heard Doyle's fellow employees accuse Doyle of doing it and he did not investigate further after Doyle denied cutting it. Tr. at 116-17, 118. Furthermore, the supervisor did not even inform any of his superiors about the incident, Tr. at 118, even though production was stopped for twenty minutes. Tr. at 119. Mr. Doyle was put on indefinite suspension only after he wrote a statement about the incident for a Commission investigator just prior to Mr. Prather's hearing. Tr. at 23-24, 88, 119-20. This hose-cutting incident had occurred prior to Mr. Prather's and yet he was not suspended until two years later and then only after a Commission investigator uncovered the incident. There is no evidence on the record as to

whether Mr. Doyle was actually discharged[1] but there is enough evidence on the record for the Commission to have concluded that Mr. Prather was treated differently because of his race.

The case of *Weatherspoon v. Andrews & Co.*, 32 FEP Cases 122, 1228 (D. Colo. 1983), was relied upon by the hearing examiner for the proposition that even if the ultimate decision of discharge is made by a senior supervisor, who is not motivated by racial animus, evidence of racial bias in more immediate supervisors is sufficient to support a finding of racial discrimination against the employer. The Court finds this authority persuasive and concludes that Mr. Ralston's lack of racial bias does not help DP&L's case.

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1. The Court emphasizes that no evidence outside the record has been considered and the Commission's motion to strike filed on August 2, 1985 and DP&L's response filed August 13, 1985 are, therefore, moot.

DP&L filed a Request for Consideration of Additional Evidence September 18, 1985. Section 4112.06(D) allows the Court to grant such a request "when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the commission."

The Court is not satisfied that the recent deposition of Mr. Prather is newly discovered evidence which could not have been ascertained prior to the hearing. Mr. Prather testified at the hearing and was cross-examined by DP&L. DP&L could have obtained the so-called "admissions" from Mr. Prather on cross-examination at the hearing. Furthermore, it appears that this evidence would only tend to impeach Mr. Prather's prior testimony and probably would not change the result of the Commission's decision. See *Wagner v. Smith*, 8 Ohio App.3d 90, 95 (Ct. App. Washington County 1982) (standard for granting new trial on grounds of newly discovered evidence). Thus, the deposition of Mr. Prather does not qualify for consideration under 4112.06(D). Accordingly, DP&L's Request for Consideration of Additional Evidence is DENIED.

Even if it is assumed that the Commission did not establish a different standard of treatment for blacks and similarly situated whites, the evidence of the discriminatory intent of the supervisors is enough to make out a case of disparate treatment. See *Williams v. TWA*, 27 FEP Cases 487, 489-90 (8th Cir. 1981). Giving "due deference to the [Commission's] resolution of evidentiary conflicts" under *Plumbers*, the Court finds that the Commission's findings and orders were supported by reliable, probative and substantial evidence.

For the foregoing reasons, the decision of the Ohio Civil Rights Commission is AFFIRMED.

SO ORDERED:

RICHARD S. DODGE, *Judge*

Copies of the above Decision and Order were sent to all parties listed below by ordinary mail this date of filing.

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Faith Johnson, Bailiff

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE OHIO CIVIL RIGHTS COMMISSION

(Dated March 12, 1985)

Complaint No. 4029

STATE OF OHIO

CIVIL RIGHTS COMMISSION

IN THE MATTER OF: SAMUEL R. PRATHER,

v.

THE DAYTON POWER AND LIGHT COMPANY.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. PRELIMINARY STATEMENT

This matter comes before the Commission upon the sworn Charge Affidavit of Samuel R. Prather, filed February 28, 1983, Complaint and Notice of Hearing No. 4029 issued on March 13, 1984; the official record of the public hearing held on July 18, 1984, before Franklin A. Martens, Esq., a duly appointed hearing examiner and all exhibits therein: the Commission's post hearing briefs filed September 18, 1984, and October 15 1984; Respondents' Brief filed October 9, 1984, the Hearing Examiner's Report filed December 13, 1984; and Respondent's objections to the Hearing Examiner's Report, filed January 3, 1985.

II. COMMISSION REVIEW

The Charge Affidavit and Complaint alleged that Respondent had terminated Complainant because of his race, which is Black. After public hearing, the Hearing Examiner recommended a finding that Respondent be ordered: (a) to cease and desist from any and all discriminatory practices; (b) to make an offer of employment to Complainant for a position at Stuart Station as a Technician A, within ten days of the receipt of this final order. Complainant should be paid at the same wage scale he would have attained had he been continuously employed by Respondent from September 12, 1982 to the date Respondent makes the offer of employment; and (c) to present to Complainant and the Commission a certified check equal to the amount of wages Complainant would have earned had he been continuously employed by Respondent from September 12, 1982 to the date Respondent makes the offer of reinstatement referenced in subparagraph (b) above. This check is to be tendered within five days of the date that Respondent makes said offer of reinstatement and shall include interest allowable by law. Any interim earnings of Complainant shall be deducted from this amount.

The Commission at its meeting on January 9, 1985 adopted the Hearing Examiner's recommendations. After careful consideration of the entire record and all premises therein, the Commission makes the following Findings of Fact, Conclusions of Law, and Order.

III. FINDINGS OF FACT

1. Samuel Prather filed a sworn charge affidavit with the Commission on February 28, 1983.

2. The Commission determined on October 21, 1983 that it was probable that unlawful discriminatory practices had been engaged in by Respondent in violation of Revised Code Section 4112.02(A).

3. The Commission attempted to eliminate the alleged unlawful discriminatory practices by conciliation. The Commission issued its complaint after conciliation failed.

4. Respondent is a corporation doing business in Ohio and an employer. Complainant is a black person.

5. Complainant was employed by Respondent at its Stuart Generating Station in Adams County from March 19, 1970 to September 13, 1982. Complainant was classified as a Technician A. Complainant worked with a crew of seven other technicians, all of whom were white. Complainant's job performance was satisfactory. His formal disciplinary record up to September 12, 1982 consisted of a one day suspension.

6. Complainant's immediate supervisor was Mike Mason, a Caucasian. Bob Hackathorn, Caucasian, also had supervisory authority over Complainant. They reported to David Elkins, Caucasian, the manager of unit three, the unit to which Complainant was assigned. Elkins reported to the manager of Stuart Station, Bob Ralston, Caucasian.

7. Complainant was working as a member of a maintenance crew on Sunday, September 12, 1982. One of the units was down for a periodic cleaning and this was done on overtime day, as was the custom.

Complainant entered the shop area in order to pick up some materials to complete a job and observed that the employees were standing around, relaxed, idly talking and laughing.

8. Complainant learned that someone had punched some small holes in a water hose and plugged up one end. When foreman Hackathorn and another bargaining unit employee tried to pressure test the hose they were sprayed with water. A new hose was being prepared as Complainant entered the shop area. Someone passed Complainant a knife and told him to cut some holes in the other hose. Complainant cut some holes in the second hose. Hackathorn, who was in the office, thought he saw Complainant cutting the hose. He pointed this out to Mason. Mason confronted Complainant who denied he had cut the hose. Both Mason and Hackathorn examined the hose and found that it had been cut.

9. Pranks and horseplay involving water were common in Stuart Station. Pranks that involved the minor destruction of company property were also common. For example, gluing or welding lockers shut. Foreman Mason was aware of these pranks. Prior to September 12, 1982, he had not written up any employees for destruction of company property or horseplay. Horseplay and destruction of company property are violations of company policy.

10. Hackathorn and Mason reported the Prather incident to the manager of unit three on September 12, 1982. The manager of unit three reported it to the manager of Stuart Station. The station manager asked Elkins to investigate both incidents. Elkins secured statements from foreman Mason on September 14 about the Prather incident. On September 15 he secured another written statement from Mason where Mason

stated he was not aware of the first hose cutting incident prior to the time he observed Complainant cutting the hose. Elkins also reported that he talked to others who were in the shop area at the time and all denied seeing Complainant do anything.

11. Elkins recommended that Complainant be discharged. He stated that Complainant's actions were the result of a "basic flaw in character". He stated "Mr. Prather does not see the right or wrong of damaging company property; be it in the act of horseplay or otherwise". Elkins reasoned that any lesser discipline would not cure Complainant's basic character flaw" and therefore he saw termination as the only option.

12. Ralston reviewed the written documents submitted by Elkins along with his recommendation. Ralston accepted Elkins recommendation that Complaint be discharged and Complainant was discharged, effective September 13, 1982.

13. Foreman Mason made frequent racially derogatory remarks about Complainant. These included calling him a "black bastard" and a "nigger". On one occasion Mason told Complainant that he would like to "march his fat black ass to the gate". After Complainant was discharged Mason stated "we finally got rid of that lazy, fucking nigger".

14. Foreman Hackathorn was a self-admitted racist. He had stated that he was prejudiced but was working on it. When Complainant and Hackathorn were working together Hackathorn had told Complainant that he had problems with blacks.

15. Complainant was subjected to harsher discipline because of his race.

IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and parties of this Complaint.

2. The Commission proved by reliable, probative and substantial evidence that Respondents had discriminated against Complainant, because of his race in violation of Revised Code Section 4112.

V. ORDER

Pursuant to Revised Code Section 4112.05(B) where the Commission has obtained jurisdiction over the parties and over the subject matter of its proceedings, and has proven by reliable, probative and substantial evidence on the record that Respondents have engaged in unlawful discrimination, the Commission is authorized and obligated to issue the Order which is set forth hereinafter.

(1) It is ORDERED that Respondent CEASE AND DESIST from violating Ohio's laws against discrimination;

(2) It is further ORDERED that within ten days of receipt of the Commission's final order Respondent offer Complainant a position at Stuart Station as a Technician A. Should Complainant accept Respondent's offer, Complainant should be paid at the same wage rate he would have attained had he been continuously employed by Respondent from September 12, 1982 to the date Respondent makes the offer of employment;

(3) It is further ORDERED that regardless of whether Complainant accepts the offer of employment, that within five days of the date Respondent makes the offer of reinstatement, Respondent present to

Complainant and the Commission a certified check equal to the amount of wages Complainant would have earned had he been continuously employed by Respondent from September 12, 1982 to the date Respondent makes the offer of employment recommended in (2) above. This amount shall include 10% per annum interest. Any interim earnings of Complainant shall be deducted from this amount.

This Order issued by the Ohio Civil Rights Commission this 12th day of March, 1985.

/s/ PHALE D. HALE
Chairman
/s/ CLINGAN JACKSON
Commissioner
/s/ RONALD C. MORGAN
Commissioner
/s/ CATHERINE ELLIS
Commissioner
/s/ ALYCE D. LUCAS
Commissioner

NOTICE OF RIGHT TO JUDICIAL REVIEW

Notice is hereby given to all herein that Revised Code §4112.06 sets forth the right to obtain judicial review of this ORDER and the mode and procedure thereof.

CERTIFICATE OF SERVICE

I, Robert Brown, Executive Director of the Ohio Civil Rights Commission, do hereby certify that the foregoing is a true and accurate copy of the ORDER issued in the matter of *Samuel R. Prather v. The Dayton Power and Light Company,* Complaint No. 4029, and filed with the Commission at its Central Office in Columbus, Ohio.

/s/ ROBERT D. BROWN
Executive Director

DATE: March 12, 1985

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS OF THE HEARING EXAMINER OF THE OHIO CIVIL RIGHTS COMMISSION

(Dated December 13, 1984).

Complaint No. 4029
23091382 (10764) 0383
057830540

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF
SAMUAL R. PRATHER,
Complainant,

and

THE DAYTON POWER AND
LIGHT COMPANY,
Respondent.

HEARING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

INTRODUCTION

Samual Prather (Complainant) filed a charge affidavit with the Ohio Civil Rights Commission (Commission) on February 28, 1983. The Commission investigated and found probable cause that unlawful discriminatory practices had been engaged in by Dayton Power and

Light Company (Respondent) in violation of Revised Code Section 4112.02(A) on October 21, 1983. The Commission's efforts to eliminate the alleged unlawful discriminatory practices by conciliation were unsuccessful and a complaint was issued on March 13, 1984. The complaint alleged that Respondent discharged Complainant for reasons not applied equally to all persons without regard to their race.

Respondent filed a timely answer to the complaint admitting certain procedural allegations but denying that it engaged in any unlawful discriminatory practice and pleading affirmative defenses.

A public hearing was held on July 18, 1984 at the Adams County Courthouse, West Union, Ohio.

The record consists of the previously described pleadings, the transcript consisting of 151 pages of testimony, exhibits admitted into evidence at the hearing and the post-hearing briefs filed by the Commission on September 20, 1984 and October 17, 1984 and Respondent on October 11, 1984.

FINDINGS OF FACT

1. Samual Prather filed a sworn charge affidavit with the Commission on February 28, 1983.

2. The Commission determined on October 21, 1983 that it was probable that unlawful discriminatory practices had been engaged in by Respondent in violation of Revised Code Section 4112.02(A).

3. The Commission attempted to eliminate the alleged unlawful discriminatory practices by conciliation. The Commission issued its complaint after conciliation failed.

4. Respondent is a corporation doing business in Ohio and an employer. Complainant is a black person.

5. Complainant was employed by Respondent at its Stuart Generating Station in Adams County from March 19, 1970 to September 13, 1982. Complainant was classified as a Technician A. Complainant worked with a crew of seven other technicians, all of whom were white. Complainant's job performance was satisfactory. His formal disciplinary record up to September 12, 1982 consisted of a one day suspension.

6. Complainant's immediate supervisor was Mike Mason, a Caucasian. Bob Hackathorn, Caucasian, also had supervisory authority over Complainant. They reported to David Elkins, Caucasian, the manager of unit three, the unit to which Complainant was assigned. Elkins reported to the manager of Stuart Station, Bob Ralston, Caucasian.

7. Complainant was working as a member of a maintenance crew on Sunday, September 12, 1982. One of the units was down for a periodic cleaning and this was being done on overtime day, as was the custom. Complainant entered the shop area in order to pick up some materials to complete a job and observed that the employees were standing around, relaxed, idly talking and laughing.

8. Complainant learned that someone had punched some small holes in a water hose and plugged up one end. When foreman Hackathorn and another bargaining unit employee tried to pressure test the hose they were sprayed with water. A new hose was being prepared as Complainant entered the shop area. Someone passed Complainant a knife and told him to cut some holes in the other hose. Complainant cut some holes in the second

hose. Hackathorn, who was in the office, thought he saw Complainant cutting the hose. He pointed this out to Mason. Mason confronted Complainant who denied he had cut the hose. Both Mason and Hackathorn examined the hose and found that it had been cut.

9. Pranks and horseplay involving water were common in Stuart Station. Pranks that involved the minor destruction of company property were also common. For example, gluing or welding lockers shut. Foreman Mason was aware of these pranks. Prior to September 12, 1982, he had not written up any employees for destruction of company property or horseplay. Horseplay and destruction of company property are violations of company policy.

10. Hackathorn and Mason reported the Prather incident to the manager of unit three on September 12, 1982. The manager of unit three reported it to the manager of Stuart Station. The station manager asked Elkins to investigate both incidents. Elkins secured statements from foreman Mason on September 14 about the Prather incident. On September 15 he secured another written statement from Mason where Mason stated he was not aware of the first hose cutting incident prior to the time he observed Complainant cutting the hose. Elkins also reported that he talked to others who were in the shop area at the time and all denied seeing Complainant do anything.

11. Elkins recommended that Complainant be discharged. He stated that Complainant's actions were the result of a "basic flaw in character". He stated "Mr. Prather does not see the right or wrong of damaging company property; be it in the act of horseplay or otherwise". Elkins reasoned that any lesser discipline would not cure Complainant's "basic character flaw" and therefore he saw termination as the only option.

12. Ralston reviewed the written documents submitted by Elkins along with his recommendation. Ralston accepted Elkins recommendation that Complainant be discharged and Complainant was discharged, effective September 13, 1982.

13. Foreman Mason made frequent racially derogatory remarks about Complainant. These included calling him a "black bastard" and a "nigger". On one occasion Mason told Complainant that he would like to "march his fat black ass to the gate". After Complainant was discharged Mason stated "we finally got rid of that lazy, fucking nigger".

14. Foreman Hackathorn was a self-admitted racist. He had stated that he was prejudiced but was working on it. When Complainant and Hackathorn were working together Hackathorn had told Complainant that he had problems with blacks.

15. Complainant was subjected to harsher discipline because of his race.

CONCLUSIONS OF LAW AND DISCUSSION

1. The Commission's Complaint alleges "(t)hat Respondent discharged Samual R. Prather for reasons not applied equally to all persons without regard to their race." This allegation, if proven, would constitute a violation of §4112.02(A) of the Revised Code which provides in part that:

> It shall be an unlawful discriminatory practice: (A) For any employer, because of the . . . race . . . of any person to discharge without just cause, . . . or otherwise to discriminate against that person with respect to . . . terms, conditions or privileges of employment or any matter directly or indirectly related to employment.

2. The Commission must prove a violation of §4112.02(A) by reliable, probative and substantial evidence. Revised Code Section 4112.02(E) and (G). Therefore, the Commission has the burden of proof in cases brought pursuant to Chapter 4112 of the Revised Code. *Sowers v. OCRC*, 49 Ohio Op. 2d 203 (C.P. Trumbull Cty.)

3. However, the Commission is not required to prove that Complainant's race was the sole reason for the employer's decision. The Commission must prove by reliable, probative and substantial evidence that Complainant's race was one factor in the employment decision. *Miller Properties v. Ohio Civil Rights Commission*, 34 Ohio App. 2d 113 (1972).

4. The Ohio Supreme Court has held that Title VII standards are to be used in evaluating alleged violations of Chapter 4112 of the Revised Code. Therefore, reliable, probative and substantial evidence means evidence sufficient to support a finding of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq. Plumbers & Steamfitters Committee v. Ohio Civil Rights Commission*, 66 Ohio St. 2d 192 (1981).

5. The order of proof in Title VII case requires the Commission to prove a *prima facie* case of discrimination.

> The plaintiff in a Title VII case possesses the ultimate burden of persuasion and the intermediate burden of proving by a preponderance of the evidence a *prima facie* case of discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 1093, 25 FEP Cases 113 (1981). A *prima facie* case of discrimination based upon a theory of disparate treatment is succinctly set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792,

802, 5 FEP Cases 965 (1973). In a disparate treatment case the plaintiff's initial burden is basically to show actions "taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.' " *Furnco Constr. Corp. v. Waters, accord, International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358, 14 FEP Cases 1514 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 & n.13, 5 FEP Cases 965 (1973). *Williams v. TWA*, 27 FEP Cases 487, 490 (8th Cir. 1981).

6. The proof required to sustain a *prima facie* case will vary depending upon the facts in each particular case. *McDonnell Douglas, supra* at n. 13.

7. A *prima facie* case of racial discrimination may be proven even where the Commission fails to show a different standard of treatment for black employees and similarly situated white employees. "If a black person is discharged with discriminatory intent by reason of his race, this establishes proof of disparate treatment. (citations omitted)" *Williams, supra* at 490.

8. In this case there was direct evidence of discriminatory intent by first line supervisors. This evidence consisted of biased statements made before and after Complainant's discharge by Mason and a statement by Hackathorn that he had racist tendencies.

> ". . . Direct evidence of discriminatory intent or the lack thereof generally pertains to the attitude and overall record of the supervisor[s] in question, both in the obvious context of adverse action against members of the protected group and/or biased statements, and also in terms of the supervisor[s]' efforts to help the employee in question or other

members of the same protected group." *Schlei and Grossman, Employment Discrimination Law,* 1983 Edition, p. 599.

9. I conclude that Hackathorn's and Mason's attitudes about Complainant as a black person influenced their handling of the two hose cutting incidents. First, I cannot credit Mason's testimony that he was not aware of the first hose cutting incident. He saw Hackathorn, who had just been sprayed with water, immediately after the incident. I do not believe that Hackathorn did not tell Mason what had happened and I think this is a reasonable inference. Mason was also able to view the work area and see the men standing around laughing. Since incidents of this type were common I cannot credit the memorandum that Mason wrote disclaiming his knowledge about the first hose cutting incident. This memorandum appears to me to be a cover-up; an attempt to justify Mason's lack of attention to the first hose cutting incident. Hackathorn testified that the first incident ended when he instructed another worker to prepare a second hose. He went into the office. Thus, there was no immediate efforts by him to investigate the first hose cutting incident.

10. Likewise, the result of any subsequent investigation of the incident, allegedly ordered by Ralston, was never even mentioned by Elkins when he issued his written report about the Prather matter. No other memorandum was introduced from Elkins to Ralston about the first hose cutting incident. I conclude that Hackathorn and Mason were not very concerned about the first prank, which was committed by a white person, but became very concerned when they saw Complainant cutting a hose. The reporting of these two incidents by the two white foreman in unit three was tainted by their racial bias.

11. Even absent this, there was racial bias exhibited by the manager of unit three. This bias was exhibited in the memorandum he wrote where he recommended that Complainant be discharged. That recommendation was primarily based on a "basic character flaw" that the manager identified in Complainant's personality. He characterized it as Complainant's inability to differentiate right from wrong. Such alleged character flaws go hand in hand with common prejudicial stereotypes that are often attributed to minorities by prejudiced whites. In *Weatherspoon v. Andrews & Co.*, 32 FEP Cases 1226 (D.C. Colo. 1983), the supervisor that made the determinative recommendation had called Complainant a "goddamned black nigger just like all the other goddamned black niggers - not worth a damm. . .". *Weatherspoon, infra.* The Court found that these statements were evidence that the immediate supervisor was a racist.

12. Direct evidence of racial bias by a supervisor can be sufficient to sustain a finding of discrimination when the immediate supervisor is a racist, even if the ultimate decision was made by a senior employee, who was not motivated by racial animus. In *Weatherspoon* the defendant argued that the more senior employee who actually made the termination decision had "clean hands" and "a pure heart" and therefore the company itself was insulated from liability. The Court disagreed, noting that the senior employee had no opportunity to scrutinize the Complainant's work, and that the senior employee admitted that when she decided to fire the employee she relied, at least in part, on the accusations about the employee's work. The Court concluded that even assuming the senior supervisory employee bore no racial animus the decision to fire the plaintiff undoubtedly was influenced and tainted by the immediate supervisor's attitudes.

13. I think the same reasoning applies to the case before us. It's obvious to me that Mr. Ralston's decision to terminate, as opposed to giving some lesser discipline to Complainant, was influenced by the memorandum written by Elkins, which discussed Complainant's basic character flaw. *See also, Perkins v. State Bhd. of Education,* 27 EPD, Paragraph 32, 303 (DCMD Tenn. 1980).

14. Thus, while Complainant was admittedly guilty of cutting a hose, I conclude that he was subjected to more stricter discipline than he would have been subjected to had he been white. I reached this conclusion because of the racist attitudes of the two white supervisors who very expeditiously processed their reports concerning Complainant's conduct while basically ignoring the similar conduct of a white employee, i.e. they made no effort to investigate that incident. I further find that such pranks were so common that the absence of previous discipline to whites could only result from selective vision and enforcement. Furthermore, when the plant manager conducted his "investigation" about both incidents he did not mention any efforts to uncover the first perpetrator. Instead he secured a disclaimer from the foreman about the foreman's knowledge of that incident. I think a reasonable inference could be drawn that that disclaimer was solicited for the purpose of making it appear that the first incident was investigated.

15. The racial bias of the plant manager is demonstrated by the language he used in the memorandum recommending termination where he talked about Complainant's basic character flaw that could not be remedied by training. This is negative evidence concerning his efforts to help the minority employee overcome his problem and provides additional evidence of racial bias. *Schlei, supra.*

16. Thus I conclude that while the racial component of this discharge decision was not necessarily attributable to Mr. Ralston himself, it was evident through the actions of the front line supervisors and the plant manager.

RECOMMENDATION

For all of the foregoing reasons, I recommend that:

(1) Respondent be ordered to cease and desist from violating Ohio's laws against discrimination;

(2) that within ten days of receipt of the Commission's final order Respondent offer Complainant a position at Stuart Station as a Technician A. Should Complainant accept Respondent's offer Complainant should be paid at the same wage rate he would have attained had he been continuously employed by Respondent from September 12, 1982 to the date Respondent makes the offer of employment;

(3) I further recommend that regardless of whether Complainant accepts the offer of employment, that within five days of the date Respondent makes the offer of reinstatement, Respondent present to Complainant and the Commission a certified check equal to the amount of wages Complainant would have earned had he been continuously employed by Respondent from September 12, 1982 to the date Respondent makes the offer of employment recommended in (2) above. This amount shall include interest allowable by law. Any interim earnings of Complainant shall be deducted from this amount.

/s/ FRANKLIN A. MARTENS
Hearing Examiner

DATED December 13, 1984

MANDATE OF THE OHIO SUPREME COURT

(Dated November 10, 1987)

Case No. 87-26

THE SUPREME COURT OF OHIO

COLUMBUS

DAYTON POWER & LIGHT COMPANY,
Appellee,

v.

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants.

MANDATE

To the Honorable Court of Common Pleas

Within and for the County of Montgomery, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals is reversed and the orders of the Commission and the Court of Common Pleas are reinstated consistent with the opinion rendered herein.

COSTS:
Motion Fee, $20.00, paid by Helen Ninos.

/s/ THOMAS J. MOYER
Chief Justice

JUDGMENT ENTRY OF THE OHIO SUPREME COURT

(Dated November 10, 1987)

Case No. 87-26

THE SUPREME COURT OF OHIO

COLUMBUS

DAYTON POWER & LIGHT COMPANY,
Appellee,

v.

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants.

JUDGMENT ENTRY

APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Montgomery County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed and the orders of the Commission and the Court of Common Pleas are reinstated consistent with the opinion rendered herein.

It is further ordered that the appellants recover from the appellee their costs herein expended; and that a mandate be sent to the Court of Common Pleas for Montgomery County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Montgomery County for entry.

/s/ THOMAS J. MOYER
Chief Justice

ENTRY OF THE OHIO SUPREME COURT DENYING MOTION FOR REHEARING

(Dated December 16, 1987)

Case No. 87-26

THE SUPREME COURT OF OHIO

COLUMBUS

DAYTON POWER & LIGHT CO.,
Appellee,

v.

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants.

REHEARING ENTRY

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

/s/ THOMAS J. MOYER
Chief Justice

TITLE VII OF THE CIVIL RIGHTS ACT, 42 U.S.C. §2000e

§2000e-2. Discrimination because of race, color, religion, sex, or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization. It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Religion, sex, or national origin as bona fide occupational qualification; educational institutions with employees of particular religions. Notwithstanding any other provision of this title [42 USCS §§2000e et seq.], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs

to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organization. As used in this title [42 USCS §§2000e et seq.], the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security. Notwithstanding any other provision of this title [42 USCS §§2000e et seq.], it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual

from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; ability tests. Notwithstanding any other provision of this title [42 USCS §§2000e et seq.], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title [42 USCS §§2000e et seq.] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation

paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 206(d)) [29 USCS §206(d)].

(i) Preferential treatment to Indians living on or near reservation. Nothing contained in this title [42 USCS §§2000e et seq.] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not required on account of numerical or percentage imbalance. Nothing contained in this title [42 USCS §§2000e et seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USCS §§2000e et seq.] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(July 2, 1964, P. L. 88-352, Title VII, §703, 78 Stat. 255; Mar. 24, 1972, P. L. 92-261, §8(a), (b), 86 Stat. 109.)

OHIO REV. CODE ANN. §4112.02(A)

§4112.02 Unlawful discriminator practices.

It shall be an unlawful discriminator practice:

(A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

(B) For an employment agency, because of race, color, religion, sex, national origin, handicap, age, or ancestry to:

(1) Refuse or fail to accept, register, classify properly, or refer for employment, or otherwise discriminate against any person;

(2) Comply with a request from an employer for referral of applicants for employment if the request indicates directly or indirectly, that the employer fails to comply with the provisions of sections 4112.01 to 4112.07 of the Revised Code.

(C) For any labor organization to:

(1) Limit or classify its membership on the basis of race, color, religion, sex, national origin, handicap, age, or ancestry;

(2) Discriminate against, limit the employment opportunities of, or otherwise adversely affect the employment status, wages, hours, or employment conditions of any person as an employee because of race, color, religion, sex, national origin, handicap, age, or ancestry.

(D) For any employer, labor organization or joint labor-management committee controlling apprentice training programs to discriminate against any person because of race, color, religion, sex, national origin, handicap, or ancestry in admission to, or employment in, any program established to provide apprentice training.

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, or labor organization, prior to employment or admission to membership, to:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, national origin, handicap, age, or ancestry, of an applicant for employment or membership;

(2) Make or keep a record of the race, color, religion, sex, national origin, handicap, age, or ancestry of any applicant for employment or membership.

(B) Such proceedings shall be initiated by the filing of a petition in court as provided in division (A) of this section and the service of a copy of the said petition upon the commission and upon all parties who appeared before the commission. Thereupon the commission shall file with the court a transcript of the record upon the hearing before it. The transcript shall include all proceedings in the case, including all evidence and proffers of evidence. The court shall thereupon have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper and to make and enter, upon the record and such additional evidence as the court has admitted, an order enforcing, modifying and enforcing as so modified, or setting aside in whole or part, the order of the

commission. The court shall require the posting of a sufficient bond before granting temporary relief or a restraining order in a case involving a violation of division (H) of section 4112.02 of the Revised Code.

(C) An objection that has not been urged before the commission shall not be considered by the court, unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.

(D) The court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the commission.

(E) The findings of the commission as to the facts shall be conclusive if supported by reliable, probative, and substantial evidence on the record and such additional evidence as the court has admitted considered as a whole.

(F) The jurisdiction of the court shall be exclusive and its judgment and order shall be final subject to appellate review. Violation of the court's order shall be punishable as contempt.

(G) The commission's copy of the testimony shall be available at all reasonable times to all parties without cost for examination and for the purposes of judicial review of the order of the commission. The petition shall be heard on the transcript of the record without requirement of printing.

(H) If no proceeding to obtain judicial review is instituted by a complainant, or respondent within thirty days from the service of order of the commission pursuant to this section, the commission may obtain a

decree of the court for the enforcement of such order upon showing that respondent is subject to the commission's jurisdiction and resides or transacts business within the county in which the petition for enforcement is brought.

(I) All suits brought under this section shall be heard and determined as expeditiously as possible.

CASE NUMBER 87-1313

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

THE DAYTON POWER AND LIGHT COMPANY — PETITIONER

VS.

THE OHIO CIVIL RIGHTS COMMISSION, et al. — RESPONDENT

On Writ of Certiorari To The Supreme Court of Ohio

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FOR SAMUEL I. PRATHER

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ATTORNEYS FOR RESPONDENT
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QUESTIONS PRESENTED FOR REVIEW

1) Can racial comments by a white supervisor of a discharged black employee provide the nexus necessary to a finding of discrimination?

2) Does this Court have Appellate Jurisdiction when there is no federal question?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NUMBER 87-1313

THE DAYTON POWER AND LIGHT COMPANY
Petitioner
vs.
THE OHIO CIVIL RIGHTS COMMISSION, et al.,
Respondents

On Writ of Certiorari to the
Supreme Court of Ohio

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Samuel I. Prather, asks this Court to deny the petition for a writ of certiorari seeking review of the judgment of the Ohio Supreme Court.

JURISDICTIONAL STATEMENT

The petitioner alleges that this Court has jurisdiction based on the existence of a federal question. The fact that Ohio has indicated its intention to follow the precedent of federal cases in interpreting state law does not create a federal question. No jurisdictional basis exists.

COUNTERSTATEMENT

Respondent Samuel I. Prather was working as a member of a maintenance crew employed at The Dayton Power and Light Company (DP&L) on Sunday, September 12, 1982. One of the units was down for a periodic cleaning. This was taking place on an overtime day, as was the custom. Prather entered the shop area in order to pick up some material to complete a job and observed

that the employees were standing around, relaxed, idly talking and laughing.

Prather learned that someone, engaged in horseplay, had punched some small holes in a water hose and plugged up one end. When foreman Hackathorn and another bargaining unit employee tried to pressure test the hose they were sprayed with water. A new hose was being prepared as Prather entered the shop area. Someone passed Prather a knife and told him to cut some holes in the new hose. Prather did so. Hackathorn, who was in the office, thought he saw Prather cutting the hose. Prather denied he had cut the hose. Both Mason and Hackathorn examined the hose and found that it had been cut.

Pranks and horseplay involving water were common at Stuart Station. Pranks that involved the minor destruction of company property were also common, such as, gluing

or welding lockers shut. Foreman Mason was aware of these pranks. Prior to September 12, 1982, he had not written up any employees for destruction of company property or horseplay. Horseplay and destruction of company property are technically violations of company policy.

Hackathorn and Mason reported the Prather incident to the manager of unit three on September 12, 1982. The manager of unit three reported it to the manager of Stuart Station. The station manager asked Elkins to investigate both incidents. Elkins secured statements from foreman Mason on September 14 about the Prather incident. On September 15 he secured another written statement from Mason where Mason states he was not aware of the first hose cutting incident prior to the time he observed Prather cutting the hose. Elkins also reported that he talked to others who were

in the shop area at the time and all denied seeing Prather do anything.

Elkins recommended that Prather be discharged. He stated that Prather's actions were the result of a "basic flaw in character". He stated, "Mr. Prather does not see the right or wrong of damaging company property; be it in the act of horseplay or otherwise". Elkins reasoned that any lesser discipline would not cure Prather's basic "character flaw" and therefore he saw termination as the only option.

Ralston reviewed the written documents submitted by Elkins along with his recommendation. Ralston accepted Elkins recommendation that Prather be discharged and Prather was discharged, effective September 13, 1982.

Foreman Mason had made frequent racially derogatory remarks about Prather.

These included calling him a "black bastard" and a "nigger". On one occasion Mason told Prather that he would like to "march his fat black ass to the gate". After Prather was discharged Mason stated, "We finally got rid of that lazy, fucking nigger".

Foreman Hackathorn was a self-admitted racist. He had stated that he was prejudiced but was working on it. When Prather and Hackathorn were working together Hackathorn told Prather that he had problems with blacks.

The Ohio Civil Rights Commission found that Prather was subjected to harsher discipline because of his race.

REASONS FOR DENYING THE WRIT

Petitioner's basic disagreement with the decision below concerns Dayton Power and Light's view of the facts and the weight to

be given the evidence, not the formation of legal rules.

Additionally, petitioner has attempted to create a federal question where there is, in fact, none. The decision of the Ohio Supreme Court was based on adequate and independent state grounds.

ARGUMENT

A) DISCRIMINATORY INTENT MAY BE SHOWN BY PERSUADING THE TRIER OF FACT THAT THE DISCRIMINATORY REASON MORE LIKELY MOTIVATED THE EMPLOYER.

This is a case of disparate treatment. It was Prather's contention from the beginning that he would not have been discharged if he had not been black. Prather alleged that he was treated differently than others who had done the same or worse acts of horseplay. Taking all of the facts into consideration, the Ohio Civil Rights Commission, after extensive testimony on the

subject, found that the discharge was based entirely on the biased report of two supervisors who had strong racial motives to recommend that Prather be fired. Plant manager Robert Ralston discharged Prather without an independent investigation on his own but based entirely on a biased report.

The Ohio Civil Rights Commission determined that other acts of horseplay and worse had, in the past, not been punished by even so much as a reprimand. The only recognizable differences in Prather's case are that he was black and that he had supervisors who had racial animus. Those differences tipped the scale against him.

DP&L did not dispute that Prather was black, that he was qualified for his job and that he was discharged. Its response was that he was discharged for destruction of company property. Prather had persuaded the trier of fact that the "discriminatory

reason more likely motivated the employer". 1Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981). This completes the nexus complained of by DP&L.

There is no reason for this Court to review this case.

B) THE OPINION OF THE OHIO SUPREME COURT IS SUPPORTED BY INDEPENDENT AND ADEQUATE STATE GROUNDS, THEREFORE, THERE IS NO FEDERAL QUESTION AT ISSUE IN THIS ACTION TO INVOKE THE SUPREME COURT'S APPELLATE JURISDICTION

"The Supreme Court's jurisdiction to review a State Court decision under 28 USCS section 1257, is dependent upon the presence of a federal question in the case." St.Louis I.M. & S.R. Co. v. Taylor, 210 U.S. 281 (1907).

DP&L contends that federal question jurisdiction is present in this action because the Ohio Supreme Court adopted federal law as the body of law governing employment discrimination actions.

Prather contends that the Ohio Supreme Court's did not adopt federal law in this case, but instead, used federal decisions as persuasive authority in coming to an independent interpretation of Ohio Revised Code Ann., section 4112.02(A).

In its opinion in this case, the Ohio Supreme Court cited Plumbers & Steamfitters Commt. v. Ohio Civil Rights Comm., 66 Ohio St. 2d 192, 421 N.E.2d 128(1981), as authority for the proper evidentiary standard to be applied in administrative proceedings.

Prather contends that the Ohio Supreme Courts' use of the Plumbers case as an evidentiary standard, is not an adoption of federal law.

Prather further contends that even if the Ohio courts had used federal cases in interpreting state law, it would not raise that interpretation to the level of a

federal question, nor would it signal Ohio's adoption of federal discrimination law.

"Where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the court will not undertake to review it." Williams v. Kaiser, 323 U.S.471,485; (1944). Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

The opinion of the Ohio Supreme Court is supported by independent and adequate state grounds. Therefore, petitioner's contention that federal question jurisdiction is present in this action is in error.

CONCLUSION

The petition for certiorari should be denied.

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CERTIFICATE OF SERVICE

I, Edward S. Monohan, a member of the Bar of The Supreme Court of the United States and Counsel of Record for Samuel I. Prather, Respondent herein, hereby certify that three copies of the foregoing brief were mailed, United States 1st class mail, postage prepaid, on this 4th day of March, 1988, to Neil F. Freund, Esq. and Jane M. Lynch, Esq., Freund, Freeze and Arnold, 1000 Talbott Tower, Dayton, Ohio 45402, Attorneys for Petitioner and Jeffrey B. Rubenstein, Esq., Assistant Attorney General, 35 East 7th Street, Suite 700, Cincinnati, Ohio 45202

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No. 87-1313

IN THE

Supreme Court of the United States

October Term, 1987

THE DAYTON POWER AND LIGHT COMPANY,
Petitioner,

vs.

THE OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Where reliable, probative and substantial evidence on the record supports the Ohio Civil Rights Commission's findings of discrimination pursuant to Ohio Revised Code §4112.02(A), as affirmed by the Supreme Court of Ohio, and there is no federal question involved, is there any reason for the Supreme Court of the United States to review the state court's decision?

2. Where racist supervisory personnel make racially-motivated reports and recommendations to an employer regarding a black employee, and the employer's reliance on those reports and recommendations constitutes the sole basis for the resulting discharge of that employee, and the Supreme Court of Ohio holds the employer liable for that discriminatory discharge as violative of Ohio Revised Code §4112.02(A) in accordance with well-established legal principles, is there any reason for the Supreme Court of the United States to review that decision?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

No. 87-1313

IN THE

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On February 28, 1983, Samuel Prather filed an affidavit with the Ohio Civil Rights Commission ("Commission"), charging that he had been discriminatorily discharged by his former employer, the Dayton Power and Light Company ("Company"), on September 20, 1982, because of his race, Black. Following a public hearing, Chief Hearing Officer Franklin A. Martens concluded that the direct evidence of racial bias and discriminatory intent exposed at the

hearing, as well as the lack of credibility of key Company witnesses, established unlawful racial discrimination by the Company, and recommended that the Company be ordered to reinstate Mr. Prather with full back pay. On March 12, 1985, the Commission determined that reliable, probative and substantial evidence supported the finding of discrimination, and issued a Final Order to this effect incorporating the recommended remedy.

The Montgomery County Court of Common Pleas affirmed the Commission's decision, upholding the Commission's finding of racial discrimination and ruling that applicable precedent established the Company's liability for the discriminatory actions of its supervisory personnel.

Nevertheless, the Second District Court of Appeals reversed both the Commission and the Court of Common Pleas, citing only "common sense". The Court misstated key facts, and simply stated that it "disagreed" with controlling legal authority, without citing any contrary authority.

A Motion to Certify was immediately granted by the Supreme Court of Ohio. On November 10, 1987, the Supreme Court issued a *per curiam* decision, reversing the Court of Appeals and reinstating the orders of the Commission and the Court of Common Pleas. The Supreme Court noted that the record clearly revealed disparate treatment of Mr. Prather, and that the Company was liable based upon evidence that white supervisors who were involved in the "chain of command" leading to Prather's termination had admitted being racist and were shown to have engaged in racist behavior and language directed toward Mr.

Prather. In fact, one Justice found it necessary to separately observe that "the facts of this case revealing such discrimination . . . are, in a word, appalling."

Petitioner now argues that a "federal question" exists here because the Supreme Court of Ohio, in *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission*, 66 Ohio St. 2d 192 (1981), stated that "federal case law interpreting Title VII . . . is generally applicable to cases involving alleged violations of [Ohio Revised Code] Chapter 4112", and that the evidentiary standards utilized under Chapter 4112 should be similar to those utilized under Title VII. Petitioner's argument is ludicrous. This action is solely a state cause of action pursuant to Ohio law, with remedies prescribed by state law. Through *Plumbers* and earlier cases, the Supreme Court of Ohio has merely recognized that the purposes and language of Chapter 4112 are similar in many respects to those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) *et seq.* Accordingly, the Court has, quite logically, held that it is appropriate for Ohio Courts, in cases brought under Ohio Revised Code Chapter 4112, to look to federal case law for guidance in interpreting the state law. This, however, does not create any "federal question" here. Indeed, Petitioner's argument would mean that every decision of the Ohio Civil Rights Commission allegedly involves a "federal question" suitable for review by the Supreme Court of the United States, which is surely not the intent or meaning of U.S. Supreme Court Rule 17.

STATEMENT OF THE FACTS

Samuel Prather, a Black male, worked with the Dayton Power and Light Company from March 19, 1970, until September 13, 1982. Mr. Prather had attained the highest status in his rank, First Class Technician A. During his 12 1/2 years of service with the Company, Mr. Prather's only discipline was a one day suspension.

All seven of the other technicians on Mr. Prather's crew were White; as were his immediate supervisor, Mike Mason; another foreman with supervisory authority over Mr. Prather, Bob Hackathorn; the manager of Mr. Prather's unit, David Elkins; and the manager of the Stuart Station, Bob Ralston.

On Sunday, September 12, 1982, Mr. Prather was working with a helper and had three job assignments. When they reported to the shop to obtain materials for their second job, they heard general laughter, and were informed that some other employees had punched holes in a water hose so that when two men, Danny Dudley and Bob Hackathorn, went to use the hose, they were sprayed with water. While this hose was being repaired, foremen Mason and Hackathorn left the area, and some of the employees resumed trying to punch more holes in another piece of hose. In the midst of this activity, someone passed Mr. Prather a knife and encouraged him to cut another hole in the hose, which he did.

This kind of "horseplay" was an everyday occurrence at the Stuart Station, which never resulted in punishment or discipline of any kind. For example, White supervisors and other employees routinely engaged in various acts, some physically harmful, including dumping buckets of water on each other, busting hardhats, and wrestling and grabbing other

individuals' testicles. Mike Mason and Bob Hackathorn were involved in many such incidents. Even Station Manager Ralston admitted discharging a handgun at the worksite, and testified that he "couldn't recall" whether Company property was damaged in the process. Many of these acts of horseplay also damaged Company property, including incidents where employees would find their lockers glued or welded shut. One such employee, John Feurt, reported such an incident to management, but there was never any disciplinary action taken.

Indeed, none of the above-mentioned White participants were ever disciplined for their actions. Although Foremen Mason and Hackathorn themselves were aware of, and participated in, many of these incidents, they had *never* written up any employee for either horseplay or destruction of Company property.

On the day in question (September 12, 1982), however, Hackathorn thought he saw Prather cutting the hose and told Mason about it. The two White foremen then wrote memoranda about the incident to Unit Manager Elkins, who in turn reported it to Station Manager Ralston. Ralston instructed Elkins to investigate both of the September 12 hose cutting incidents. Pursuant to this alleged "investigation", Elkins submitted a recommendation to Ralston that Prather be discharged, based on several "conclusions": Elkins stated that the "root cause" of Mr. Prather's actions was "a basic flaw in character"; that "Mr. Prather does not see the right or wrong of damaging company property, be it in the act of horseplay or otherwise"; and that the only "effective corrective action" which would remedy Mr. Prather's "basic character flaw" would have to be termination, as any lesser discipline would not remedy that "non-trainable" flaw.

Based upon this recommendation, Prather was discharged effective September 13, 1982. Prather was notified of this action by a letter signed only by Elkins himself.

It is extremely important to note this "chain of command" involved in Mr. Prather's termination, because overwhelming evidence on the record establishes that Mason, Hackathorn, and Elkins are admitted racists and/or have exhibited racist behavior. For example, earlier in 1982 Mason told Prather that "if anybody ever got to walk (Prather's) fat black ass to the gate, (Mason) hoped he was the one to do it!", as attested to by both Prather and witness Eddie Grooms. Mason continually made racial slurs and degrading remarks about Prather in the presence of witness Frank Rosselot, a Born Again Christian, who testified that he had frequently heard Mason call Prather "a lazy Black bastard" and a "nigger". Mason also made no secret of his racism to witness John Feurt, who returned from a work-related back injury on September 14, 1982, while Mr. Prather was still on an indefinite suspension pending the alleged "investigation" of the matter. At that time, Mason informed Feurt that "we're finally rid of that lazy fuckin' nigger!"

With regard to the other employee who "reported" Mr. Prather's actions, Bob Hackathorn admitted that he was "prejudiced", but "working on it". This is confirmed by the testimony of other witnesses. In August of 1982, John Feurt heard Hackathorn admit that he was a racist but "trying to do something about it". Moreover, Danny Dudley, a Black Male, testified that as far back as 1978 he and Hackathorn had discussed Dudley's being married to a White woman. During these conversations,

Hackathorn not only stated that this interracial marriage was "wrong", but also openly admitted "several times" that he was prejudiced.

Bob Hackathorn also exhibited racist tendencies and animosity directly toward Prather. Hackathorn admitted to Prather that he had a "problem with Black people", was a "racist", and knew it. Furthermore, just two days before he was discharged, Prather was driving a truck to pick up supplies, when he saw Hackathorn along the road and, pursuant to standard company procedure, blew the horn as he approached. Hackathorn wheeled, pointed his finger at Prather, and angrily stated "all right, big boy, your day is comin' and your day is comin' soon!". This forecast proved to be correct.

Again, it is crucial to note that these two men—Mason and Hackathorn—supplied Unit Manager Elkins with the only reports of the hose cutting incident, which in turn formed the basis for Elkins' report to Station Manager Ralston. Elkins' recommendation of termination itself is filled with unsubstantiated generalizations regarding Mr. Prather's alleged "basic flaw in character" which was "not trainable," and is further set against a background of animosity as a result of other remarks which Elkins had made to Prather just one week before his discharge. Ralston, in turn, relied solely on these reports and recommendations in making an ultimate decision to discharge Prather, having never himself conducted any investigation of the incident. It was Unit Manager Elkins, not Station Manager Ralston, who signed Prather's termination letter.

Prather's termination is particularly suspect when compared with the handling of another hose-cutting incident just five months earlier. In April of 1982, four welders were working in a boiler, where two men had to

share one air hose. One man reached for the air hose of another employee, Danny Doyle, a White Male. Doyle got angry, and during an ensuing argument, Doyle cut the air hose with his knife, releasing 100 pounds of pressure and blowing so much ash around the boiler that the men could barely see. Production was stopped for about twenty minutes while the hose was repaired. Although foreman Forrest Fields was aware of this incident, and suspected that Doyle was responsible because of teasing and kidding by co-workers, the only "investigation" he conducted consisted of asking Doyle directly if he had done it. When Doyle predictably denied the act, Fields "just took him at his word" and gave the matter no further thought; he never discussed it with Elkins, Ralston, or anyone else in management.

Doyle received no discipline at the time. It was not until July 13, 1983, five days before the Commission hearing on Mr. Prather's discharge, and over two years after the fact, that the Company placed Doyle on indefinite suspension after counsel for the Company received a signed statement pursuant to formal discovery in which Doyle detailed this incident. Doyle was subsequently reinstated at Stuart Station. Clearly, the investigation and discipline surrounding the Doyle incident is disparate to that imposed on Mr. Prather.

In response to all of this evidence of direct racial animus and disparate treatment, the Company tried to argue that two White employees were allegedly discharged for acts "similar" to those of Mr. Prather. These incidents are clearly not comparable. The first involved a White foreman named Phil Dunn, who engaged in a heated argument with a union-eligible employee. During the argument, Dunn ordered the other employee to get out of his chair; when the employee

refused, Dunn jerked the chair out from under him. This actual battery by a representative of management upon a union-eligible employee goes beyond the purview of joking and horseplay, and is clearly not comparable to merely poking a hole in a hose. Station Manager Ralston himself admitted that the incident "could have caused very serious bodily harm", and that this was not mere horseplay among employees.

The second incident involved two employees named Partridge and Winters, who engaged in an argument at a different Station of DP&L. During that argument, Partridge became so incensed that he kicked the glass out of the door of a coal barge unloader in order to attack Winters. Again, this incident involved an immediate threat of serious physical harm to another employee, and damaged an expensive and technical piece of equipment. Moreover, despite the serious nature of these offenses, and despite an unsatisfactory work rating in September 1978, Partridge was permitted to resign and the Company expunged his record.

Sam Prather, a Black man, received no such preferential treatment, even though his work record was superior to Partridge's.

SUMMARY OF ARGUMENT

As outlined earlier, this Court should deny the instant Petition. There is no "federal question" presented for review, simply a state court decision affirming a state commission's finding of discrimination on the facts before it, in accordance with well-established legal principles. The state court has logically held that case law interpreting Title VII is "generally applicable" to cases arising under the Ohio civil rights laws, given the similarities between those two statutory schemes; thus, Ohio courts may look to federal law for guidance in deciding cases brought pursuant to Ohio Revised Code Chapter 4112. Nevertheless, this is still an action brought solely as a state cause of action pursuant to state law, with remedies prescribed by state law. Accordingly, the state court has not decided any "federal question" here, and none is presented for this Court's review.

Proceeding to the merits of this case, the paramount issue before the Supreme Court of Ohio was whether there is reliable, probative and substantial evidence on the record to support the Commission's finding that Samuel Prather's race was a factor in his termination by Petitioner in September of 1982. This evidence includes statements by supervisory personnel exhibiting overt racial hostility toward Mr. Prather, and evidence establishing that Mr. Prather was then subject to disparate treatment in being reported by those racists for engaging in a single act of horseplay, while numerous White employees who committed similar acts were never reported or disciplined. Mr. Prather was then terminated based solely upon those reports. Given these facts, as found by the Ohio Civil Rights Commission and affirmed by the Supreme Court of Ohio, controlling legal authority

mandates that Petitioner is liable for the blatantly discriminatory actions of those supervisory employees which directly caused Mr. Prather's termination.

Petitioner attempts to change the facts of this case and the governing legal principles herein by asserting that there were simply "racial comments" made by supervisors to Mr. Prather, which were not connected in any way to his discharge. This assertion is patently absurd. The evidence shows that three racist supervisors discriminatorily reported Mr. Prather for a single act of horseplay and recommended his termination, while Whites were never reported or disciplined for similar acts. Then, based solely on those reports and recommendations, Mr. Prather was in fact terminated. Thus, there is unquestionably a clear "nexus" between the racism of Petitioner's supervisors and the resulting discharge of Samuel Prather, and applicable legal precedent mandates that Petitioner be held liable for that discharge.

Given the above facts and legal principles, it is disturbing that Petitioner chooses to cite cases before the Supreme Court of the United States which are not only irrelevant, but which have never been cited at any previous stage of this proceeding. Cases such as *Erebia*, *Howard* and *Levine* (cited in Petition, pp. 10-11), are inapplicable on their facts, as they deal solely with "hostile work environments." Conversely, the instant case reveals that Samuel Prather's racist supervision actively perpetrated a tangible job detriment upon him, by discriminatorily engineering his termination from the Company.

Petitioner's only other defense is that it could not have discriminated against Samuel Prather because it was unaware of the entire panoply of horseplay being

committed by White employees and supervisors throughout the plant. This excuse was dismissed as not credible at the earliest stages of this case, and that factual determination has been upheld by the Supreme Court of Ohio as based upon reliable, probative and substantial evidence on the record. The Supreme Court of the United States is not the place for Petitioner to now attempt to retry the facts of this matter for the fifth time.

Based upon the facts established by the trier-of-fact herein, as affirmed by the Supreme Court of Ohio, and based upon the controlling legal precedent set forth fully below, the Ohio Civil Rights Commission urges the Supreme Court of the United States to deny the instant Petition, and to thereby remedy, once and for all, the grave injustice perpetrated against Samuel Prather.

REASONS FOR DENYING THE WRIT

I. Where reliable, probative and substantial evidence on the record supports the Ohio Civil Rights Commission's findings of discrimination pursuant to Ohio Revised Code §4112.02(A), as affirmed by the Supreme Court of Ohio, and there is no federal question involved, there is no reason for the Supreme Court of the United States to review the state court's decision.

Ohio Revised Code §4112.06(E) mandates, with respect to judicial review of a Final Order of the Ohio Civil Rights Commission, that:

> **(E) The findings of the Commission as to the facts shall be conclusive if supported by reliable,** probative, and substantial evidence on the record and such additional evidence as the court has admitted considered as a whole.

The Supreme Court of Ohio has endorsed this standard. *Plumbers and Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission, et al.* (1981), 66 Ohio St. 2d 192, 196.

In the instant case, the Commission's findings of fact are supported by reliable, probative and substantial evidence on the record, and solidly support the Commission's ultimate finding that the Company unlawfully discharged Samuel Prather in violation of Ohio Revised Code §4112.02(A). That section provides that it shall be an unlawful discriminatory practice:

> **For any employer, because of the race . . . of any** person, to . . . discriminate against that person with respect to hire, tenure, terms, conditions or privileges of employment, or any other matter directly or indirectly related to employment.

The Commission established a *prima facie* case of unlawful discriminatory discharge based upon race by demonstrating that: (1) Mr. Prather is Black; (2) he was discharged; and (3) White employees were retained, or not even disciplined, despite engaging in conduct similar to that which resulted in Mr. Prather's discharge. *McDonnell-Douglas Corp. v. Green* (1973), 411 U.S. 792, 803.

Evidence establishes that Mr. Prather was subject to disparate treatment, in being reported and terminated for engaging in a single act of horseplay, whereas White employees and supervisors had no discipline imposed when they routinely committed acts such as dumping water on each other, breaking Company hardhats, gluing and welding lockers shut, wrestling and grabbing each other's testicles, and even firing a handgun on the premises. Yet when Sam Prather, a Black man, simply poked a hole in a hose at others' urging, he was terminated.

The incident involving Danny Doyle in April of 1982 stands out as an example of disparate treatment. Both Doyle and Prather engaged in the act of cutting a hose, which shut down their respective operations for the same amount of time. Yet, while Prather was discharged as a result of investigation reports filed by admittedly racist supervision, the "investigation" of the Doyle incident consisted only of one cursory question posed to Mr. Doyle. No discipline was imposed upon Doyle until immediately before the Commission hearing in this matter, nearly two years after the act, and even then Mr. Doyle was not discharged; rather, he was placed on indefinite suspension, and subsequently reinstated by the Company.

Despite this overwhelming evidence of disparate treatment of Mr. Prather, Petitioner argues that it should not be held liable because it was simply unaware of these other acts or the identities of the perpetrators. However, this assertion is contradicted by direct evidence in the record, and ignores the legitimate evidentiary inferences and credibility determinations made by the Ohio Civil Rights Commission as the trier-of-fact.

For example, with regard to the panoply of horseplay and destruction of Company property outlined above, evidence establishes that foremen Mason and Hackathorn themselves were aware of, and participated in, many of these incidents, but had never written up any employee for such acts. Furthermore, employee John Feurt reported the damage to his locker to management, but no disciplinary action was taken.

In addition, there were two other incidents of horseplay of which management was certainly well aware, but took no action. First, there was the incident involving Danny Doyle. Foreman Forrest Fields was not only aware of the incident, but had strong reason to suspect that Doyle was the perpetrator because of teasing and kidding by co-workers. However, Fields' only "investigation" of the matter was to ask Doyle himself if he had done it. When Doyle denied the deed, the matter was closed. Moreover, on September 12, 1982, there was a hose-cutting incident immediately prior to the one committed by Sam Prather of which Hackathorn was aware, yet there is no evidence of any investigation regarding that first incident.

Thus, contrary to Petitioner's argument, many incidents involving Whites were reported to management, and several of the incidents actually

involved management. Indeed, Petitioner's argument makes a mockery of common sense. It is simply not reasonable or credible for the Company to argue that in the midst of water hoses being cut, men wrestling around, hardhats and lockers being destroyed, and handguns being discharged, that none of the supervisory personnel were aware of these incidents or able to conduct an investigation—if they had so desired—which would lead to the identity of the perpetrators.

As noted by this Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed. 2d 207 (1981), "evidence and inferences properly drawn therefrom may be considered by the trier-of-fact on the issue of whether the defendant's explanation is pretextual". *Burdine* at L. Ed. 2d 216, note 10 (9b). This is precisely what the Commission did in the instant case. The Commission properly drew inferences based on the evidence before it which support the conclusion that the Company's supervisory personnel were aware of these routine incidents, and that they simply chose not to take any action. When Petitioner's own supervisory personnel are so lackadaisical in investigating and disciplining incidents involving White employees, Petitioner cannot use that fact to insulate itself from liability when those same supervisors discriminatorily engineer the termination of a Black employee. In fact, such an approach would permit employers to vest lower-level supervisory personnel with full discretion to selectively enforce alleged work rules and discriminate in their disciplinary reports of employees, thereby achieving discriminatory discipline while claiming ignorance of all such abuse. This Court cannot permit such emasculation of our anti-discrimination laws.

Petitioner also attempts to argue that two White employees, Dunn and Partridge, were allegedly discharged for acts similar to those of Samuel Prather. However, as outlined earlier, the actions engaged in by these two men were far more serious than Sam Prather's prank of hose-cutting. The Dunn incident involved a representative of management committing a battery on a union-eligible employee, with an admitted possibility of "very serious bodily harm". The Partridge incident likewise involved an attempted attack on another employee, through smashing a glass door on an expensive and technical piece of machinery. Furthermore, Partridge was given the opportunity to resign with his work record expunged despite his probationary history. Clearly, neither of these incidents can reasonably be characterized as the same kind of "horseplay" engaged in by Mr. Prather, and neither establish any comparable treatment of White employees for behavior similar to that which Mr. Prather engaged in.

The Supreme Court of Ohio, following "a thorough review of the record" herein, held that "reliable, probative and substantial evidence (supports) the findings and orders of the commission and the trial court." By thereby rejecting the Company's baseless arguments, the Court properly gave "due deference to the (Commission's) resolution of evidentiary conflicts" in this matter. *Hazlett v. Martin Chevrolet, Inc.* (1986), 25 Ohio St. 3d 279; *University of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108.

II. Where racist supervisory personnel make racially-motivated reports and recommendations to an employer regarding a Black employee, and the employer's reliance on those reports and recommendations constitutes the sole basis for the resulting discharge of that employee, and the Supreme Court of Ohio holds the employer liable for that discriminatory discharge as violative of Ohio Revised Code §4112.02(A) in accordance with well-established legal principles, there is no reason for the Supreme Court of the United States to review that decision.

Despite the considerable evidence of disparate treatment set forth above, Petitioner argues that it should not be held liable because there is no "nexus" between the racial animus exhibited by the three supervisory personnel whose reports and recommendations formed the basis for Mr. Prather's termination, and the termination itself. This argument is fallacious as a matter of law.

The "chain of command" underlying Mr. Prather's discharge has been clearly established. The two men who "reported" Mr. Prather for cutting the hose, Mason and Hackathorn, are both racists. Mason frequently referred to Mr. Prather as "a lazy Black bastard", and after Prather's termination stated that he was glad to be "rid of that lazy fuckin' nigger!" Mason also told Prather shortly before his discharge that he wanted to "walk (his) fat Black ass to the gate!" Likewise, Hackathorn is an admitted racist who told Prather two days before he was fired that "your day is comin' soon!"

The reports of these two men—neither of whom had ever reported any other employee for similar acts of horseplay—then formed the basis for Elkins' report to

Ralston, recommending Mr. Prather's dismissal. Elkins generalized that Prather had a "basic flaw in character [which was] not trainable", thereby revealing a racist, stereotyped view of Prather. Elkins himself then signed Prather's termination notice, not Ralston. Ralston never conducted any independent investigation of the incident, instead fully relying on the reports and recommendations of Mason, Hackathorn and Elkins.

It is thus apparent that Mr. Prather's discharge was a direct result of the blatant racism of those three men, and well-established legal principles mandate that Petitioner must be held liable for Mr. Prather's discharge which was based solely upon the racially-motivated reports and recommendations of those supervisors.

In *Weatherspoon v. Andrews and Co.* (1983), 32 F.E.P. 1226 (D.C. Colo.), an overtly racist supervisor had made a determinative discharge recommendation. The company attempted to argue that it should not be held liable because the ultimate decision had been made by a more senior employee who had not been shown to be a racist. The Court definitively dismissed that argument, noting that the ultimate decision-maker had no opportunity to scrutinize the employee's work, and that the decision-maker relied on the accusations of the racist supervisor. Based on these facts, the Court found that the termination was tainted with racial animus, and was thus wrongful.

Similarly, in *Mitchell v. Keith* (1985), 752 F.2d 385, 36 F.E.P. 1443 (9th Cir.), and *Montgomery v. Campbell Soup Co.* (1986), 647 F. Supp. 1372, 42 F.E.P. 721 (N.D. Ill.), the employers argued that they should not be held liable for the discharges of Black employees because they had a good faith reliance on, or honest belief in, reports and recommendations submitted by lower-level supervisors, even though those reports may have been

racially motivated. In each case, however, the court held that where a supervisor's report and recommendation were racially motivated, the employer may be held liable under the doctrine of *respondeat superior;* and once the employer bases an employment decision on such a racially motivated report, the corporate decision becomes tainted by discrimination.

These cases are based upon the very reasoning articulated by this Court in *Meritor Savings Bank v. Vinson* (1986), 477 U.S. _____, 106 S. Ct. 2399, 40 F.E.P. 1822, *J.* Marshall, concurring:

> An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt company-wide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy. Nonetheless, Title VII remedies, such as reinstatement and backpay, generally run against the employer as an entity. The question thus arises as to the circumstances under which an employer will be held liable under Title VII for the acts of its employees.
>
> The answer supplied by general Title VII law, like that supplied by federal labor law, is that the act of a supervisory employee or agent is imputed to the employer. Thus, for example, when a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer. The courts do not stop to consider whether the employer otherwise had "notice" of the action, or even whether the

> supervisor had actual authority to act as he did. E.g., Flowers v. Crouch-Walker Corp., 552 F. 2d 1277, 1282, 14 FEP Cases 1265, 1268 (CA7, 1977); Young v. Southwestern Savings and Loan Assn., 509 F.2d 140, 10 FEP Cases 522 (CA5 1975); Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 723, 4 FEP Cases 987 (CA6 1972).

40 F.E.P. Cases at 1830. (Footnotes and citations omitted). *See, also, Jeppsen v. Wunnicke* (1985), 611 F. Supp. 78, 37 F.E.P. 994 (D.C. Alaska); *Ponton v. Newport News School Board, et al.* (1986), 42 F.E.P. 83 (E.D. Va.).

A cogent analysis of the *Meritor* decision is found in *Schroeder v. Schock*, 42 F.E.P. 1112 (D.C. Kan. 1986), where the court held that an employer must be held strictly liable for its discharge of a female employee, where that termination decision was based on a recommendation of the woman's supervisor which was deemed to be in retaliation for her refusal to comply with the supervisor's sexual demands. The court observed that *Meritor* affirmed that we should look to agency principles to determine an employer's liability for the acts of supervisors, particularly in a situation where an actual discharge or other job action has been taken against an employee for unlawful reasons.

See, Gay v. Board of Trustees of San Jacinto College, 608 F.2d 127, 23 F.E.P. 1569 (5th Cir. 1979); *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 11 F.E.P. 449 (10th Cir. 1975); *Newman v. Arco Corp.*, 491 F. Supp. 89, 7 F.E.P. 385 (M.D. Tenn. 1973); *Williams v. TWA*, 660 F.2d 1267, 27 F.E.P. 487, 489-90 (8th Cir. 1981). *See also*, 29 C.F.R. §1604.11(c), fn. 1.[1]

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[1] The cases cited by Petitioner (*Erebia, Howard* and *Levine*) are inapplicable here, as they do not deal with tangible job detriment; they merely address "hostile work environment" claims.

Nevertheless, in an attempt to escape the clear mandate of these significant precedents, Petitioner engages in a strained and misguided analysis of case law. For instance, Petitioner argues that some of the Commission's cited cases are inapplicable to the instant case because of the "primary distinguishing fact" that the reports which Mason and Hackathorn submitted at the outset of the "investigation" into Prather's termination were "objectively true", whereas in some of the cited cases the reports submitted were not factual. This allegedly "primary distinguishing fact" has absolutely no relevance to the legal issue of an employer's liability for the discriminatory actions of its supervisory personnel.

The issue in this case has never been whether Samuel Prather cut a hose. Prather admitted at an arbitration hearing regarding his discharge, well before the Commission's hearing on the issue of discrimination, that he cut a hose on September 12, 1982. However, the issue in this employment discrimination action goes much deeper than the mere "objective truth" of the reports submitted by Mason and Hackathorn. The issue here is whether *White employees*, when they engaged in acts *similar* to those of Sam Prather, were *reported* to management and received *discipline* similar to that imposed on Sam Prather. The answer to that question, based upon all of the evidence reviewed earlier, is clearly "*No*". The question of unlawful racial discrimination *does not* simply examine an alleged "just cause" for discipline, whether it be a violation of a printed work rule or some other articulated reason. Rather, a *discrimination action* focuses on whether an employee in a *protected class* who admittedly engaged in *certain activity* has been treated the *same as other employees* who engaged in *similar activity*.

The illogic of Petitioner's argument is clear on the facts of this case. Despite an alleged work rule against the destruction of company property, every time White employees perpetrated such horseplay, supervisory personnel made no significant investigation and just "let boys be boys". Conversely, when two blatantly racist supervisors see a Black employee take part in a similar act of horseplay, they immediately submit "objectively true" reports about the incident. These reports lead directly to a recommendation by a middle-level supervisor that the Black employee be terminated because of a "basic flaw in character [which is] not trainable", which in turn causes the Station Manager to terminate the Black employee. The Station Manager conducts no independent investigation, and does not even sign the termination notice. In short, on the facts of this case, the Company would be permitted to delegate disciplinary decisions to lower and middle-level supervisory personnel, who could then selectively and discriminatorily enforce alleged Company policies or work rules, yet the Company could never be held liable for those actions. Such a result, as Petitioner would have this Court endorse, has no justification in logic, justice, or law.

The fallacy of Petitioner's argument is clearly illustrated by examining the decision in *Abasiekong v. City of Shelby*, 744 F.2d 1055 (4th Cir. 1984). In that case, evidence showed that a Black employee had used the services of several City employees for his own personal gain. Despite this evidence of improper behavior on the part of the plaintiff, evidence revealed that numerous White City employees had also used City vehicles, City personnel, or City property for their

personal use. However, "none of the White employees were disciplined or otherwise visited with sanctions because of those activities". 744 F.2d at 1057. Therefore, the Fourth Circuit held the City liable for the discriminatory actions of its overtly racist supervisory personnel in terminating Abasiekong:

> In contrast to the treatment dealt Abasiekong, it appears that several White City employees enjoyed with complete impunity and some regularity the use of City vehicles and resources for personal activities. Here is the crux of our decision favoring Abasiekong. Had no disparate treatment favoring Whites been established, the impropriety of diversion of public property to private use and enjoyment would doubtless have justified the termination of Abasiekong's employment. *See, McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976) (Court acknowledges that a claim of racial discrimination may be maintained by Whites who allege that they were fired for misappropriating employer's property, while a Black employee similarly charged was not dismissed). . . .

744 F.2d at 1057.

Likewise, in the instant case Petitioner stated that it had a policy against horseplay or destruction of Company property, yet the evidence showed that numerous White employees routinely violated that alleged policy and suffered no discipline or other sanctions because of their activities. On the other hand,

Samuel Prather, a Black man, was terminated for a similar act. This constitutes unlawful disparate treatment and discrimination as a matter of law.[2]

Finally, the Commission notes the decision in *Grubb v. W. A. Foote Memorial Hospital, Inc.*, 741 F.2d 1486 (6th Cir. 1984), 759 F.2d 546 (6th Cir. 1985), *cert. den.*, _____ U.S. _____, 106 S. Ct. 342 (1985). In *Grubb*, the Sixth Circuit deferred to the factual determinations made by the District Court as trier-of-fact, and upheld the District Court's judgment finding the employer liable for the discriminatory actions of its supervisory personnel on facts not nearly as compelling as those on the record here. Likewise, the factual determinations and finding of unlawful discrimination by the Commission here should be upheld based upon reliable, probative, and substantial evidence on the record.

With reference to the remainder of Petitioner's arguments, Petitioner curiously argues that *Montgomery v. Campbell Soup Company*, 647 F. Supp. 1372, 42 F.E.P. 721 (N.D. Ill. 1986), is not applicable here because the *Montgomery* court did not actually hold in favor of the Plaintiff based on the facts in that case. However, that does not alter the *Montgomery* court's clearly stated proposition that if the employer considers racially-motivated reports of supervisors in its decision to

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[2] The facts of this case are also similar to those in *Mitchell v. Keith*, *supra*, where the supervisor essentially tricked the employee into violating a work rule, then reported him for that violation. In our case, supervisory personnel had long-established that acts of horseplay would not be subject to investigation or discipline; however, as soon as Samuel Prather was convinced to participate in one such prank, his racist supervision engineered his termination from the Company.

terminate a Black employee, "the corporate decision becomes tainted by discrimination". *Montgomery* at 42 F.E.P. 725.[3]

The Commission also fails to see the point of Petitioner's argument regarding the Supreme Court's decision in *Meritor Savings Bank v. Vinson* (1986), 477 U.S. _____, 106 S. Ct. 2399, 40 F.E.P. 1822. Petitioner observes that the *Meritor* Court did not apply a "strict liability" standard in assessing the employer's liability in that "hostile environment" sexual harassment case. While this may be true, it has nothing to do with the issue of whether the Company should be held liable for the discriminatory termination of Samuel Prather. This issue is clearly addressed in Justice Marshall's concurrence in *Meritor*, in which four Justices joined. The concurrence explicitly reached the same conclusion already espoused by numerous Courts of Appeals, that where the discrimination actually results in "tangible job detriment" to the employee, the employer will automatically be held liable for the discriminatory actions of its supervisory personnel. (Please see the *Meritor* concurrence for an extensive listing of such cases). Similarly, while the majority of the Court in *Meritor* "declined the parties' invitation to issue a definitive rule on employer liability" in that "hostile environment" case, the majority nonetheless held that

[3] The Commission urges this Court to note that the Company in *Montgomery* tried to rely upon two of the same cases which Petitioner relies upon, *DeHorney v. Bank of America*, 39 F.E.P. 723 (9th Cir. 1985), and *Arna v. Northwestern University*, 640 F. Supp. 923, 41 F.E.P. 647 (N.D. Ill. 1986). The *Montgomery* Court distinguished each of those cases, and held them inapplicable to the facts before it; for identical reasons, both *DeHorney* and *Arna* are inapplicable to the instant facts. See *Montgomery* at 42 F.E.P. 725.

"we do agree with the EEOC that Congress wanted Courts to look to agency principles for guidance in this area." 40 F.E.P. at 1829.

Petitioner also argues that *quid pro quo* sexual harassment cases, such as *Schroeder v. Schock*, 42 F.E.P. 1112 (D.C. Kan. 1986), which deal with a tangible job detriment to an employee as a result of a supervisor's discriminatory actions, have not been applied to "cases with facts similar to the present case". There is no reason in logic or law why those holdings could not, or should not, be applied here. As those cases and all others previously cited illustrate, an employer must be held liable for the discriminatory actions of its supervisory personnel which result in a tangible job detriment to another employee.

In fact, Petitioner concedes this very point at page 15 of its Petition, by acknowledging that an employer "may be held liable for the discriminatory actions of its supervisors which affect the tangible job benefits of an employee on the basis of race." (Citing *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982). With this acknowledgment, the issue in this case is simply focused upon the proof of discrimination discussed earlier, i.e., the evidence of racial hostility and disparate treatment on the record herein. When the facts of this case are compared with the facts in *Weatherspoon, Abasiekong*, and the other cases cited above, it is clear that the Commission's finding of unlawful discrimination is supported by reliable, probative and substantial evidence on the record.

CONCLUSION

Based upon the foregoing analysis of the facts on the record and the controlling legal principles applicable herein, the Ohio Civil Rights Commission respectfully urges this Court to deny the instant Petition. As set forth in the Decision of the Supreme Court of Ohio, reliable, probative and substantial evidence on the record supports the Commission's finding that Samuel Prather was subject to disparate treatment, and that such disparate treatment was the result of intentional discrimination at the hands of the Company's overtly racist supervisory personnel. Once those facts have been established, Petitioner must be held liable as a matter of law for Mr. Prather's termination, which was directly attributable to the racially-motivated reports and recommendations of those supervisory personnel.

Contrary to Petitioner's misguided arguments, this case does not involve "strict liability", nor does it involve a situation where isolated "comments" were made to a Black employee. The Commission determined, and the Supreme Court of Ohio affirmed, that the racial hostility of the supervisory personnel motivated them to selectively and discriminatorily report the actions of Sam Prather, and that based solely on those reports and recommendations, Mr. Prather was terminated. Thus, the "nexus" between that racism and the termination has been clearly established on the record herein.

Likewise, it is disingenuous for Petitioner to claim that it was without knowledge of any of the incidents of horseplay committed by White employees and supervisors. That excuse was deemed not credible by the trier-of-fact based upon the entire record, and that

factual determination has been affirmed by the Supreme Court of Ohio. Petitioner now is attempting to re-try this case for a fifth time, and that attempt must be rejected by this Court.

Accordingly, the Ohio Civil Rights Commission urges the Supreme Court of the United States to deny the instant Petition, and thereby uphold the decisions of the Supreme Court of Ohio and the Commission herein.

Respectfully submitted,

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